No. 1406.

Brief of Lovett for P. E.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Jan. 12, 1898.

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, FREDERIC P. OLCOTT, W. D. CLEVELAND and C. LOMBARDI,

Plaintiffs in Error,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Brief and Argument for Plaintiffs in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 406.

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, FREDERIC P. OLCOTT, W. D. CLEVELAND and C. LOMBARDI,
Plaintiffs in Error,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

Statement.

This suit was instituted in the District Court of Nolan County, Texas, on February 3d, 1890, by the State of Texas, through her Attorney-

General, to recover of the Houston and Texas Central Railway Company, Frederic P. Olcott and George E. Downs sixteen sections of land of 640 acres each, located in that county by virtue of certificates issued by the State of Texas to the Houston and Texas Central Railway Company. It was alleged, in effect (Record, 1–5), that the State owned and was entitled to the possession of the lands sued for, and that the certificates described in the petition were issued to the Houston and Texas Central Railway Company by the Commissioner of the General Land Office of Texas without authority of law; that at the time of the construction and completion of the road for which they were issued there was no law, general or special, in force in the State of Texas authorizing or permitting their issuance, and that the action of the Commissioner of the General Land Office in issuing and delivering them, and permitting them to be located, and allowing the lands to be surveyed thereunder, and in receiving and filing the field-notes in the General Land Office of the State, was wholly without authority of law and in plain violation of the Constitution and laws of the State in force at the time. It was also

alleged that some of such certificates were issued for the construction of sidings and that there was no law authorizing the issuance of certificates for any such purpose; and it was also alleged that they were located in the territory reserved by an act passed May 2, 1873, for the location of certificates issued to the Texas and Pacific Railway Company; but these latter allegations, in view of the issues upon which the case was determined, are not material. It appears from the State's petition (Subdivision 7) that the certificates were a part of those issued for the construction and completion of about ninety-four miles of the main track and about two and a half miles of side-tracks of that part of the company's railway extending from Brenham to Austin.

While the suit is for the recovery of only sixteen sections of land, it affects the title to the entire grant of sixteen sections made by the State of Texas to the Houston and Texas Central Railway Company for each mile of that part of the western branch of that company's road extending from Brenham to Austin, amounting, in the aggegate, to about 980,000 acres. The defendant George E. Downs disclaimed

(Record, p. 28), and on such disclaimer was discharged by judgment of the District Court (Record, p. 34).

The nature of the suit and the main issues involved before this Court may be briefly summarized as follows: The State seeks to recover lands granted to the railway company as an inducement to and in consideration of the construction of its railroad. The grounds of recovery substantially are that the State, acting through its Governor and its Land Department, made a mistake many years ago when it considered that the railway company was entitled, under its legislative charter, and the amendments thereto, and the general laws of the State on the subject, to receive the land certificates in question for the portion of the railroad concerned, because it claimed that whatever right to State aid in land the railway company might have had under its charter or the general laws for the construction of such road was destroyed by the provision of the Constitution of 1869, which, it is claimed, repealed all laws granting such lands. The railway company and its vendee answer this in effect that under its charter and the amendments thereto, and the general laws, it had a contract

right to receive the lands which it had earned by the construction of its railroad which could not be impaired and its vested right to such lands destroyed by the Constitution of 1869 without contravening the Constitution of the United States. The case in further detail is as follows:

Acts Incorporating the Company.

The Houston and Texas Central Railway Company was incorporated under the name of the "Galveston and Red River Railway Company" by a special Act of the Legislature of Texas, approved March 11th, 1848, and which is printed in full in the appendix (*post*, p. I.). By that act (Section 2) the company was "invested with "the right of making, owning and maintaining a "railway from such point on Galveston Bay, or its "contiguous waters, to such point on Red River "between the eastern boundary line of Texas and "Coffee Station, as the said company may deem "most suitable, *with the privilege of making, own-* "*ing and maintaining such branches to the railway* "*as they may deem expedient.*" By the act of incorporation the company was invested "with "capacity to make contracts, to have succession "and a common seal, to make by-laws for its gov-

" ernment, and in its said corporate name to sue " and be sued, to grant and to receive, and, gen- " erally, to do and perform all such acts and things " as may be necessary or proper for or incident to " the fulfillment of its obligations or the mainte- " nance of its rights under this act and consistent " with the provisions of the Constitution of this " State."

The original act of incorporation was amended and supplemented by another special act approved February 14th, 1852 (*post*, p. VI.–XVIII.), by Section 14, of which (*post*, p. XIV.) there was granted to said company eight sections of land of 640 acres each for every mile of railway completed and made ready for use; and provision was made for the inspection of the road from time to time by the State Engineer as sections of five miles thereof should be completed, and for the issuance of certificates for the lands thus granted, and for the location of such certificates upon the public domain of the State, the survey of the land, the return of the field notes and the issuance of patents. It was provided in Section 16 that the lands should not be donated unless the company should commence the construction of its road within two years, and complete at

least ten miles thereof within three years from the passage of the act; and, by Section 17, that its charter should become null and void unless the company should commence the construction of its road within five years and complete twenty miles thereof within six years from the passage of the act.

It is to be observed that the land grant made by this act was not confined to the main or any particular line of the company, but extended, without restriction, to all lines it should construct, which, of course, included branches, since by the original act of incorporation the company was invested "with the privilege of "making, owning and maintaining such branches "to the railway" as it should deem expedient.

By another special act, approved February 7th, 1853 (*post*, p. XVIII.), the preliminary action of the incorporators in commencing the survey and grade of the railway at the City of Houston was confirmed; and by Section 2 *the company was "further authorized and empowered "to extend said railway to the City of Galveston, "and also to make and construct, simultaneously "with the main railway described in the original "acts establishing said company, a branch thereof*

" *towards the City of Austin under the same re-*
" *strictions and stipulations provided in said*
" *original act*," *etc.*

The First General Law Granting Lands to Encourage the Construction of Railroads.

On January 30th, 1854, the Legislature passed a general law entitled " An Act to encourage the construction of railroads in Texas by donations of land " (*post*, p. XIX.), which was the first general law passed by Texas granting lands to encourage the construction of railroads. Section 1 of the act provided:

> " That any railroad company chartered
> " by the Legislature of this State, hereto-
> " fore or hereafter constructing within the
> " limits of Texas a section of twenty-five
> " miles or more of railroad, shall be entitled
> " to receive from the State a grant of sixteen
> " sections of land for every mile of road so
> " constructed and put in running order."

By Section 12 of the act (*post*, p. XXVIII.) the grant thereby made was limited as follows: That it should not extend to any company receiving from the State a grant of more than sixteen sections, nor to any company for more

than a single track with the necessary turnouts; that any company then entitled to receive a grant of eight sections of land per mile for the construction of any railroad, and which accepted the provisions of that act, should not be entitled to receive any grant of land for any branch road; that the act should not be so construed as to give to any company then entitled to receive eight sections of land more than eight additional sections; that no company should receive any donation of benefit under the act unless it should construct and complete at least twenty-five miles of the road contemplated by its charter within two years after the passage of the act; that the donation should be discontinued in every instance where the company should not construct and complete at least twenty-five miles of the road contemplated by its charter each year after the construction of the first twenty-five miles, that the "proviso herein contained" should not extend to any railroad the terminus of which was not fixed on the Gulf coast, the bays thereof or on Buffalo Bayou, which "proviso" was only with respect to the time within which certain construction was required (Quinlan vs. H. & T. C. Ry. Co., 89 Tex., 356, 373); that the certifi-

cates issued under the provision of the act should not be located upon any lands surveyed or titled previous to the passage of the act, and that the act should continue in force for the term of ten years from the time it should take effect, and no longer. By a supplemental act (*post*, p. XXX.), approved the same day, it was provided that no company availing itself of the provisions of the act thus supplemented should receive more than sixteen sections to the mile "by virtue "of said act or any proviso therein contained," and that no company benefited by said act should receive any donation of land under its charter or under the act thus supplemented for any work not done within ten years after the passage of the act.

Railroad companies entitled to land under this act were required by Section 3 to cause the land to be surveyed into sections of 640 acres each, and in square blocks of not less than six miles, unless prevented by previous surveys or by navigable streams, which survey should be delineated upon a map or maps, the even and odd sections being differently colored and regularly numbered from one upward to the full number contained in the block, and the field-

notes of the survey or maps should be deposited with the Commissioner of the General Land Office. Section 6 provided:

"That any railroad company having "completed and put in running order a sec- "tion of twenty-five miles or more of its "road may give notice of the same to the "Governor, whose duty it shall be to ap- "point some skillful engineer, if there be "no State engineer, to examine said section "of road, and if, upon the report of said "engineer under oath, it shall appear that "said road has been constructed in accord- "ance with the provisions of its charter and "of the general laws of the State in force at "the time regulating railroads, thereupon "it shall be the duty of the Commissioner "of the General Land Office to issue to "said company patents for the odd sections "surveyed in pursuance of the second and "third sections of this act; but in case said "lands, or any part thereof, shall not have "been surveyed at the time said section is "completed, then it shall be the duty of "said Commissioner to issue to said com- "pany certificates of 640 acres each, equal "to sixteen sections per mile of road so "completed, whereupon said company may "apply to the District Surveyor of any land "district in this State to survey any quan- "tity of vacant land subject to location and "entry in such district not to exceed twice

" the quantity of certificates so issued, which
" surveys shall be made, numbered and col-
" ored as directed in the third section of this
" act; and, upon the return of the field-notes
" and map or maps of such surveys to the
" General Land Office and the certificates
" so issued, it shall be the duty of the Com-
" missioner to issue to said company patents
" for the odd sections of said surveys, pro-
" vided that, in case the certificates are not
" applied for before the completion of any
" section of road, it shall not be necessary to
" deposit with the treasurer a bond as re-
" quired in the second section of this act."

Section 11 provided that all the alternate or even-numbered sections of land surveyed in pursuance of the provisions of the act should be reserved to the use of the State, and should not be liable to locations, entries or pre-emption privileges until otherwise provided by law.

This act immediately stimulated railroad construction in the State. While the operation of the act was, by its provisions, limited to ten years, and the benefit of the grant was restricted to work done within ten years, yet before the expiration of that period, and by a general act passed January 11th, 1862, entitled " An Act for the relief of railroad companies "

(*post*, p. LIV.), as well as by another general act of the same date, entitled "An Act for "the relief of companies incorporated for the "purpose of internal improvement by allowing "them further time for performance on account "of the pending war" (*post*, p. LI.), the benefits of the act and the time for the construction of work required by it were extended until two years after the close of the then prevailing war; that is to say, until August 20th, 1868, the war having ended in Texas August 20th, 1866 (*The Protector, 12 Wall, 702; Grigsby vs. Peak, 57 Tex., 142*). Before that date, however, the Legislature passed an act, which was approved November 13th, 1866, entitled "An Act for the benefit of railroad companies" (*post*, p. LXI.), whereby the grant of sixteen sections of land to the mile to railroad companies was extended under the same restrictions and limitations theretofore provided by law for ten years after the passage of said act, or, say, until November 13th, 1876. Sec. 43, Art. XII., of the Constitution of 1869, provided: "The statutes of limitation of "civil suits were suspended by the so-called 'Act "of 'Secession of the 28th of January, 1861, and "shall be considered as suspended within this

" this State until the acceptance of this Constitu-
" tion by the United States Congress." This Court had occasion to consider, in Davis vs. Gray, 16 Wall., 203, the two acts of January 11th, 1862, and the act of November 13th, 1866, with respect to the extension thereby of the laws of Texas theretofore in force granting lands to railroad companies, and held that by such acts the land-grant laws of the State were in force when the Constitution of 1869 was adopted (see to same effect *Railroad vs. Commissioners, 36 Texas, 382*).

It may be observed here that at the time of the passage of the general act of January 30th, 1854, the Houston and Texas Central Railway Company was, by Section 14 of the special act of February 14th, 1852, amending its charter, entitled to eight sections of land for each mile of road it should construct, which was granted without restriction respecting the lines to be constructed, and which, therefore, extended to branch as well as main lines, since the company, under Section 2 of its original act of incorporation (*post*, p. I.), was invested with the privilege of making, owning and maintaining such branches as it should deem proper, and

was by Section 2 of the special act of February 7th, 1853 (*post*, p. XIX.), expressly authorized to construct a branch to the City of Austin. The company could not, however, take the grant of sixteen sections per mile made by the general act of 1854, and at the same time take eight sections per mile for its branches, since the general act provided that any company then entitled to eight sections per mile, and accepting the provisions of that act, should not be entitled to receive any land for branch roads. This situation gives significance to a provision of the special act of January 23d, 1856 (*post*, p. XXXI.), which we shall next consider.

Further Special Legislation Relating to the Company.

On January 23d, 1856, the Legislature passed a special act entitled "An Act for the relief of "the Galveston and Red River Railway Com- "pany and supplemental to the several acts in- "corporating said company" (*post*, p. XXXI.), by which, after providing that the company should have six months after the 30th day of January, 1856, to complete the first twenty-five miles of its road, commencing at the City of

Houston, it was declared that "said company shall " be entitled to the rights, benefits and privileges " granted by an act approved January thirtieth, " eighteen hundred and fifty-four, entitled 'An Act " 'encourage the construction of railroads in " 'Texas by donations of land,'" upon the completion of said twenty-five miles within said six months, etc., upon certain conditions, viz.: (1) That it should maintain its principal office and keep its records on its line of road; (2) that a majority of its directors should reside in the State, and that its meetings for election of directors and officers should be held in the State; (3) that it should complete its main line to a certain point before commencing the branch road; (4) that it should submit itself to the general act of February 7th, 1853, regulating railroads; and (5) that it should yield all general branching privileges, "*except such as were expressly granted by* " *the provisions of its charter to certain points*" (*i. e.*, to Austin under the act of February 7th, 1853). Section 5 of the act reading as follows:

> "That said railroad company, in accept- " ing the benefits of this act, shall yield all " general branching privileges, except such " as are expressly granted by the provisions

" of its charter, to certain points, and shall " be required to spend only so much of its " capital stock upon any branch as shall be " expressly subscribed to such branch, and " shall not spend upon its trunk any moneys " subscribed to any branch, and shall be re- " quired to complete its main trunk to the " point on Red River contemplated in its " charter, or to such point of intersection be- " tween said road and some other road run- " ning from the northern or eastern bound- " ary of Texas toward El Paso as shall be " agreed upon between the directors of said " companies " (p. XXXIV.).

Said act also provided (Section 3) that said company might assign certificates for lands granted it; that it should be authorized to borrow money from time to time for the construction of its railway and secure the same by pledging and mortgaging its property, real, personal and mixed, and might issue bonds therefor, and should have the right, after the location and survey of the lands granted it, or any part thereof, to mortgage, hypothecate or sell any part of said lands.

By another special act, approved September 1st, 1856 (*post*, p. XLVI.), the name of the Galveston and Red River Railway Company was

changed to "The Houston and Texas Central "Railway Company," and it was also provided that the failure of the company to complete the second section of its road within one year after the completion of the first section should not work a discontinuance of the benefits of the general act of January 30th, 1854, or of any other general or special laws relating to railroads.

By another special act passed February 4, 1858 (*post*, p. XLVIII.), it was, among other things, provided that the failure of the company to complete the third section of its road by July 30th, 1858, as required by prior laws, should not work a discontinuance of the benefits of the act of January 30, 1854, or of any other laws in reference to railroads if the company should complete the third section by July 30th, 1859, and that on the completion of subsequent sections of twenty-five miles annually after July 30th, 1859, or fifty miles every two years, "said company shall be " entitled to sixteen sections of land per mile con- " templated in said last-mentioned act for each " section so completed."

By another special act, approved February 8th, 1861 (*post*, p. LI.), any default that may have existed with respect to construction was

waived and the company was given until January 30th, 1863, in which to perform such work, but before the extension thus given had elapsed the war commenced.

The War Period.

At the beginning of the war in 1861 the company had completed and had in operation its main line as far as Millican, about eighty miles from the terminus on Buffalo Bayou at Houston (Record, 73). Construction, of course, was suspended during the war. On January 11th, 1862, the Legislature passed two general acts—one entitled "An "Act for the relief of railroad companies" (*post*, p. LIV.), and the other entitled "An Act for "the relief of companies incorporated for the pur- "pose of internal improvement by allowing them "further time for performance on account of the "pending war" (*post*, p. LII.), the effect of which was to continue in force all laws granting lands to railroad companies and to extend the time within which they were required to construct certain parts of their lines until two years after the close of the war (Davis vs. Gray, 16 Wall., 203). Both of these acts provided—

the one first mentioned in Section 4, and the other in Section 2—in substantially the same language, that:

> "The president and directors of the "Houston and Texas Central Railway Com- "pany shall, before the provisions of this "act shall extend to the benefit of said com- "pany, pass a resolution restoring the "original *bona fide* stockholders of said "company—those who have paid for stock "—to all the rights, privileges and immu- "nities to which they were entitled previous "to, and of which they were divested by, "the sale of said road to W. J. Hutchins "and others, and shall forward to the Gov- "vernor of the State a copy of said resolution "signed by the president and counter- "signed by the secretary or treasurer un- "der the seal of said company; and said "company shall not have the power to re- "peal said resolution so as to defeat the "object of this act; provided that, if said "*bona fide* stockholders should fail to pay "into the treasury of said company ten "per cent. upon their said stock on or before "the expiration of the extension of time pro- "vided in this act for railroad companies to "fulfill their charter obligations to the State, "then and in that case said stockholders "shall forfeit all their rights, privileges and "property interests as stockholders in said "road" (*post*, pp. LIII. and LVI.).

The resolution required by these acts was duly passed by the company (Record, pp. 29, 32, 80). The effect of these acts, as we have already seen, was to continue in force the general act of January 30th, 1854, as well as all other laws granting lands in aid of the construction of railroads, and extend the time for all such construction until two years after the close of the war, or, say, until August 20th, 1868 (the war ending in Texas August 20th, 1866). Before the expiration of that time the general act of November 13th, 1866, already referred to, entitled "An Act for "the benefit of railroad companies" (*post*, p. LXI.), was passed, whereby the grant of sixteen sections per mile by prior laws was continued for ten years from that date, or, say, until November 13th, 1876. The act also provided that all tap roads over twenty-five miles long should be entitled to the benefits of the act. The District Judge, in this case, held that this act was not in accordance with the Constitution of Texas, and was upon that ground void, but pending the appeal in the Court of Civil Appeals the Supreme Court of Texas held in Quinlan vs. H. & T. C. Ry. Co., 89 Texas, 356, that the act was valid.

Special Act of September 21st, 1866.

If there was any doubt before respecting the right of this company to lands for the construction of its western division to Austin, it was removed by a special act approved September 21st, 1866 (*post*, p. LVIII.). By this act a specific grant was made to said company "of sixteen "sections of land of 640 acres each for every mile "of road it has constructed or may construct and "put in running order in accordance with the "provisions of its charter;" but it was provided that the lands theretofore received under the general act of January 30th, 1854, should be deducted from the grant thus made, though the certificates issued therefor should "be included "in the terms, benefits and conditions of this act "as if issued by virtue of its provisions." It was also provided that the company should construct and put in running order an additional section of twenty-five miles of its road within one year from January 1st, 1867, or fifty miles within two years from that date, and that it should be completed to Bryan by the first day of September, 1867. Provision was made by the act for the inspection of the road from time

to time as sections should be completed and for the issuance and location of certificates and the survey of the lands thereby granted.

The Washington County Railroad.

The Washington County Railroad Company was incorporated by a special act approved February 2d, 1856, (*post*, p. XXXVI.), and by Section 3 of the act the company was invested "with the right of locating, constructing, own- "ing and maintaining a railway commencing at "such point on the trunk of the Galveston and "Red River Railroad as said corporation shall "deem most suitable, crossing the Brazos River "within the limits of Washington County, and "then running by the most suitable and direct "line to Brenham in said county." It was also, by Section 2, invested "with capacity in said "corporate name to make contracts, to have suc- "cession and a common seal, to make by-laws for "the government and regulation of the said "company, to sue and be sued, to plead and be "impleaded, to grant and receive, and, generally, "to do and perform all such acts as may be "necessary and proper for or incident to the "fulfillment of its obligations," etc.

The Washington County Railroad Company, in pursuance of its act of incorporation, was organized, and thereafter constructed and put in operation a line of railroad from a junction with the Houston and Texas Central Railway at Hempstead; thence directly toward the City of Austin to Brenham, a distance of about twenty-five miles (Record, p. 30).

Some time prior to August 29th, 1868, the exact date not being shown by the record, the Houston and Texas Central Railway Company purchased the Washington County Railroad at foreclosure sale. On the date last mentioned the convention, which assembled in pursuance of the reconstruction acts of Congress to frame a new Constitution for the State, and which did frame the constitution subsequently adopted and known as the "Constitution of 1869," passed an ordinance (*post*, p. LXIII.), reciting, among other things, that the Houston and Texas Central Railway Company had become the owner, by purchase, of the Washington County Railroad; that both of said companies were indebted to the State for sums borrowed from the special school fund; that the Houston and Texas Central Railway Company desired to extend the

Washington County branch to the City of Austin as soon as it could be done, and to extend its main line to Red River; and that it was desirable that the bonds of said company given for the school-fund loan should be exchanged for bonds of the Houston and Texas Central Railway Company secured by a deed of trust referred to; and it was then, among other things declared, "*that "the Washington County Railroad is hereby made "and declared to be a branch of the Houston and "Texas Central Railroad, and shall henceforth "be known and called the 'Western Branch of "the 'Houston and Texas Central Railway,' "and shall be controlled and managed by said "Houston and Texas Central Railway Company, "and the Houston and Texas Central Railway "Company shall have the right to extend said "western branch of their road from the Town of "Brenham, in Washington County, to the City of "Austin, in Travis County, by the most eligible "route as near an air line as may be practicable.*"

The same convention also passed, on December 23rd, 1868, a "declaration for the relief of "the Houston and Texas Central Railway Com-"pany," (*post*, p. LXVII.), which provided that the company should not suffer "any forfeiture

" of any rights secured to it by existing laws by
" reason of the failure of said company to con-
" struct and put in running order their said rail-
" way to the Town of Calvert, in Robertson
" County, by the first day of January, A. D.
" 1869, as required by the act of the 21st of Sep-
" tember, A. D. 1866, provided said railway shall be
" constructed and put in good running order for
" the use of the public, to the said Town of
" Calvert, by the first day of April, A. D. 1869."

Subsequently the Constitution framed by the convention which passed the above ordinance was submitted to a vote of the people, as required by the reconstruction acts of Congress, at an election held November 30th to December 3rd, 1869, and was accepted by Congress by an act of March 30th, 1870 (16 Stats. at Large, Chap. 39, p. 80), and took effect on that day, as decided in Grigsby vs. Peak, 57 Tex., 142, or on the date of its adoption, December 3, 1869, as decided in Peak vs. Swindel, 68 Tex., 242. Section 6, Article X., of that Constitution, reads as follows:

" The Legislature shall not hereafter
" grant lands to any person or persons, nor
" shall any certificates for land be sold at
" the Land Office, except to actual settlers

" upon the same, and in lots not exceeding
" one hundred and sixty acres."

On August 15th, 1870, the Legislature of Texas passed a special act entitled " An Act for " the relief of the Houston and Texas Central " Railway Company" (*post*, p. LXVIII.), which recites substantially the same matters as were recited in the declaration of the Constitution of 1868, above stated, and provided in Section 1 as follows:

" That the Washington County Railroad
" is hereby made and declared to be, to all
" intents and purposes in law, a part of the
" Houston and Texas Central Railway,
" and shall be under the control and
" management of the Houston and Texas
" Central Railway Company in like manner
" as every other part of said railway, and
" the Houston and Texas Central Railway
" Company shall have the right to build and
" extend the part of its railway heretofore
" known as the ' Washington County Rail-
" ' road ' from the Town of Brenham, in the
" county of Washington, to the City of
" Austin, in the County of Travis, by the
" most eligible route to be selected by
" engineers of the company; and the said
" company shall also have the right to
" build a branch road diverging from the

" main trunk at some point in Navarro
" County and striking Red River at such
" point as will enable such railway company
" to make a connection with any railroad
" which may be built to said river from the
" northward; and the said Houston and
" Texas Central Railway Company, by rea-
" son of the construction of said railway
" from the Town of Brenham to the City of
" Austin, and by reason of the construction
" of said branch from Navarro County to
" Red River, shall have and enjoy all the
" rights, privileges, grants and benefits that
" are now, or may at any time hereafter, be
" secured to any railroad company in the
" State of Texas by any general law of the
" State, and shall be subject, in respect of
" said railway and said branch, to all the
" duties and responsibilities imposed upon
" the said Houston and Texas Central
" Railway Company by its charter and by
" other laws of the State."

Section 4 reads as follows:

" No forfeiture of any of the rights or
" privileges secured to it by existing laws
" shall be enforced against the Houston and
" Texas Central Railway Company by rea-
" son of its failure to comply with the con-
" ditions as to construction imposed by the
" first section of the act of the 21st of Sep-
" tember, A. D. 1866, entitled 'An Act

" ' granting lands to the Houston and Texas
" ' Central Railway Company;' but the
" said company shall have and enjoy all
" the rights and privileges secured to it by
" existing laws the same as if the conditions
" embraced in the first section of the said
" act of the 21st of September, A. D. 1866,
" had been in all respects complied with,
" provided that the land grant to said com-
" pany shall cease unless the said company
" shall complete their main trunk east of
" the Brazos River to Richland Creek in
" Navarro County within twelve months
" from the first day of October, A. D. 1870,
" and shall also complete their road to the
" City of Austin within two years after the
" passage of this act."

The company completed its road to the City of Austin on the 25th day of December, 1871 (see 20th Finding of Fact by the District Court, Record, p. 31), and completed its main line to Richland Creek on the 26th day of September, 1871 (see 14th Finding of Fact by the District Court, Record, p. 30).

On May 17th, 1871, the Legislature passed a joint resolution proposing an amendment to Section 6, Article X., of the Constitution of 1869, above quoted, so as to authorize the Legislature to grant lands for purposes of internal improve-

ment (*post.* p. LXXVI.). This amendment was adopted by a vote of the people at an election held in November, 1872, and on March 19th, 1873, the Legislature, by a joint resolution, ratified the amendment (*post*, p. LXXVII.), as provided by the Constitution of 1869 in reference to amendments. Thereupon the Legislature of Texas passed many special laws granting lands to railroads, which laws, as well as all special laws herein referred to, by stipulation of counsel (Record, p. 49) may be looked to by the Court with the same effect as if contained in the record (G. H. & S. A. vs. State, 81 Tex., 572), and afterward, on March 16, 1867, the Legislature passed another general law granting sixteen sections of land per mile in aid of the construction of railroads (*post*, p. LXXIX.).

It was admitted by the State in writing at the trial "that the defendants paid taxes on the "lands sued for continuously since they were "located and up to the present time," and "that "the defendants paid all the fees of locating and "surveying the said lands sued for, as well as for "the same number of alternate sections known as "the even numbers for the public free-school "fund" (Record, p. 49). Application for the inspection of the Austin line, as well as for the

main line to Corsicana, was made by the company to the Governor February 9th, 1872 (Record, p. 56), and on the 12th of the same month the Governor appointed John W. Glenn to inspect the road (Record, pp. 56, 57), and the report of Glenn showing the completion of the road was made February 21st, 1872 (Record, pp. 57-63). The lands were placed on the maps of the General Land Office and always recognized as the company's land (see Map, Record, p. 82, 83).

Defendant's Answer.

The Houston and Texas Central Railway Company and Frederic P. Olcott, in answer to the State's petition, first pleaded in abatement (Record, pp. 6-10) that the lands sued for, with all other property of the Houston and Texas Central Railway Company, were then in the custody of the United States Circuit Court for the Eastern District of Texas, through its Receiver, Charles Dillingham; that the jurisdiction of said Circuit Court over the subject matter was exclusive, and that the District Court of Nolan County was, therefore, without jurisdiction to entertain the State's action; and also

pleaded in abatement that the Receiver of the Federal Court (Dillingham) was a necessary party to the action. To the merits they pleaded the general issue and other matters, only some of which it is necessary to notice in this connection. Without attempting to state the various matters set forth in the answer it is sufficient in this connection to say that the defendants named set up (Record, pp. 15-23) the special acts incorporating and relating to the railway company and the general laws hereinbefore mentioned, and alleged in effect that the company proceeded with the construction of its road in pursuance of said acts and in reliance upon the grants thereby made, and completed its entire road "by virtue of its charter and the "general and special laws passed by the Legisla- "ture of the State of Texas and became entitled "to said land grants and certificates;" that the road was inspected from time to time by engineers appointed by the Governor, as required by said acts, and certificates for the lands granted were issued as the several sections were completed; that they were located at the time by the company at large expense; that the executive officers of the State charged with the admin-

istration of such laws had issued the certificates and always recognized the right of the company to the lands located by virtue thereof; that all taxes assessed by the State upon the land subsequent to such locations had been paid by the company; that with the consent of the State the company had, years before, mortgaged the land to secure bonds given for money used in the construction and equipment of its lines of railway; that such mortgages had been foreclosed and the lands in question, as well as all other property of the company, had been sold in the foreclosure proceedings and had been purchased by the defendant Olcott; and that by reason of the special acts relating to the company and the general laws of the State relating to railroads, and by the construction and completion of its lines of railway in reliance upon such laws and the grants thereby made, the company had acquired, and its vendee or assignee and co-defendant Olcott had become invested with, a contract and vested right to said lands within the protection of Section 10 of Article 1 of the Constitution of the United States, which denies to the States power to pass any law impairing the obligation of contracts, and Article XIV. of the amend-

ments of said Constitution, providing that no State shall deprive any person of life, liberty or property without due process of law, etc.; and that in so far as the Constitution of 1869, or any other pretended law of the State, sought to impair said contract or divest such right, the same was in contravention of the said provision of the Constitution of the United States (Record, pp. 22, 23).

The answer further averred, in effect, that the decisions of the Governor of the State, required as a prerequisite for the issuance of land certificates that the company had done all the necessary antecedent acts and performed all the conditions precedent to a right to receive said lands—were conclusive against the State, the Governor having been by the various legislative acts referred to constituted the sole and final judge whether or not such antecedent acts and conditions had been performed, and that the certificates of the General Land Office and the surveys thereunder, pursuant to the findings and decision of the Governor of the State, vested a full and perfect title to the lands in the company; and it was further set up and claimed that, by reason of the construction placed upon its charter and the

special acts relating to the company and the general laws of the State by all departments of the State Government, and by reason of the said grants of land, credit was given to the defendant company in the money markets of the world, and it was enabled to raise and procure money for the purpose of constructing and extending its railroad by mortgaging the lands now sued for, which lands form a most important element in the credit originally obtained by it in disposing of its bonds secured by deed of trust thereon; that during more than twenty years the State and her officers stood by and allowed the assertion of title by the defendant company to said lands, whereby credit was obtained, as aforesaid, and they were therefore estopped from setting up any title thereto, etc. (Record, 23). Without stating the answer in more detail, we beg to refer to it as contained in the record (pp. 6–27), if a more minute examination of it should be desired.

It is proper to observe here, that as a matter of fact, the theory upon which this suit was commenced was that, in the view of the Attorney-General who filed it, the company was not entitled to land for sidings, and that, because the certificates issued for the western branch showed

upon their face that the sidings were included, the entire grant was therefore void; and it is not too much to say that the grounds upon which the case was decided by the District Court, or by the Appellate Courts of the State, were not in the mind of the Attorney-General when this litigation was commenced, but were mere afterthoughts developed when the Supreme Court of Texas decided (June 27, 1891) in G. H. & S. A. Ry. Co. vs. State, 81 Tex., 572, while this suit was pending in the court below, that the theory of the Attorney-General prompting the institution of this suit was unsound, and that, if lands for sidings were not granted, only the certificates for sidings should be canceled. This accounts for the amount of matter appearing in the pleadings, as well as in the evidence, having special reference to the issuance of certificates for the construction of side-tracks.

Grounds of Decision in the District Court.

As authorized by the Texas practice, the District Judge stated in writing the facts found by him and his conclusions of law (Record, 28–30). We have no complaint to make of the *facts* as found by him, so far as they go, except the finding

that the company did not complete its road within the time required by the special act of September 21, 1866, and even as to that our complaint is not so much with the fact as found as with the action of the Court in inquiring into it at all, and with the conclusion of law (the 9th, Record, 33) based upon such finding, our contention being upon that point, briefly, that the fact was for the determination of the executive officers of the State exclusively, and that, they having determined it years before the trial, their determination was conclusive and the Court had no right to inquire into it; and, moreover, that the consequences of the fact, if fact it be, have not been claimed, but have been expressly waived, by the State. Our position with respect to this point is presented in the argument under the ninth (Record, 157–163) and eleventh (Record, 169–178) grounds of the petition for writ of error in the State Supreme Court.

As already pointed out, the District Judge concluded, as a matter of law (Eighth Conclusion of Law, Record, p. 33), that the Act of November 13, 1866 (*post*, p. LXI.), continuing in force for ten years from that date the laws granting lands to railroad companies, was unconstitu-

tional and void, and that therefore the general law of January 30, 1854, had expired before the adoption of the Constitution of 1869, and that there were, therefore, at that time no general laws in force granting lands to railroad companies; but, while this case was pending in the Court of Civil Appeals, the Supreme Court of Texas, in Quinlan vs. Houston and Texas Central Railway Company, 89 Tex., 356, held that the Act of November 13, 1866, was valid. The District Judge also held in effect (Tenth Conclusion of Law, Record, p. 33) that the Constitution of 1869 repealed the land-grant laws and that the Act of August 15, 1870 (*post*, p. LXVIII.) was contrary to the Constitution of 1869; and that for such reasons, the road in question having been constructed after the adoption of the Constitution of 1869, the issuance and location of the certificates therefor were unauthorized and void.

Grounds of Decision in the Court of Civil Appeals.

In G., H. & S. A. Ry. vs. State of Texas, 89 Texas, 340, the Supreme Court of Texas held that the Constitution of 1869 repealed the laws

theretofore passed granting lands to railway companies; and in the case at bar the Court of Civil Appeals, after adopting that view, by reference to the opinion in that case, and in Quinlan vs. H. & T. C. Ry. Co., 89 Texas, 356, practically conceded that the Houston and Texas Central Railway Company had the right to construct the line to Austin under the early laws relating to the company that were passed prior to the adoption of the Constitution of 1869, and that such right was retained by the company, but that the right to acquire sixteen sections of land per mile for such branch road was not, and for the reason apparently that such grant in the view of the Court had been taken away by the Constitution of 1869. It was also held by that Court that the Act of August 15, 1870, was contrary to the Constitution of 1869 and void.

The grounds of the decision of the Court of Civil Appeals therefore seemed to be (1) that the Constitution of 1869 repealed all laws then in force granting lands to railway companies, although under the Act of November 13, 1866, such laws were continued in force for ten years thereafter, and also regardless, it would seem, of the extent to which such land-grant laws had

been accepted and acted upon by the construction of railroads; (2) that while the company had the right, under the early acts relating to it, to construct the line to Austin, it did not retain, after the adoption of the Constitution of 1869, the land grant, if any, for that line; (3) and that the Act of August 15, 1870, could not affect the claim to the land grant in any way because it was contrary to that provision of the Constitution of 1869 which the Court held prohibited land grants. Thus it clearly appears that the judgment of the Court of Civil Appeals was to the effect that the Constitution of 1869 repealed all laws granting lands to railroad companies apparently without regard to the contract right arising from the acceptance of such laws and the construction of the lines of railroad thereunder.

Grounds of the Decision of the State Supreme Court.

The State Supreme Court, in its opinion (Record, 185–187), denying the petition for writ of error, declined to consider whether the company had the right, under the early acts relating to it, to construct its line to Austin, but held that the extension of the former Washington County Railroad (which connected with the company's

main line at Hempstead) from Brenham to Austin was unauthorized by any of the acts relating to the company except that of August 15th, 1870, and that, the latter act having been passed while the Constitution of 1869 was in force, the company could not, by anything done thereunder, acquire any right to the land grant; and upon this ground it refused the writ of error without considering other questions determined by the District Court.

The effect of this ruling was that the company did not have any contract right to the lands granted it for the construction of the Austin line under any law passed prior to the Constitution of 1869, and that therefore there was no contract to be impaired by that Constitution.

On writ of error from this Court to the Court of Civil Appeals, the Federal questions supporting the jurisdiction of this Court should, we assume, be looked for in the rulings of that Court, and Federal questions there determined are not to be limited or eliminated by an opinion filed by the State Supreme Court in refusing an application for a writ of error. If the Federal question is to be looked for in the judgment directly under review (that is, the judgment of the Court

of Civil Appeals) rather than in an opinion of the Supreme Court of the State refusing to take jurisdiction of the case, then it is entirely clear that the Federal questions exist. If, however, we are to look to the opinion of the State Supreme Court, then the first inquiry is whether there was in existence a contract to be impaired by the Constitution of 1869, as alleged by the plaintiffs in error and as denied by the State Supreme Court.

The Federal Questions in the Record.

We have already shown (*ante*, pp. 31–36) that the Federal questions pointed out in the assignments of error (Record, 191–193) were specially set up and claimed in the answer of the railway company and Olcott in the District Court; that they were preserved in the assignment of errors filed on the appeal to the Court of Civil Appeals (Record, 87–93); that they were involved in the decision and were expressly decided by the latter Court (Record, 95–97), and were preserved and presented again in the motions for rehearing in that Court (Record, 98, 102, 108, 116, 136); that they were presented to the Supreme Court in the petition for writ of error (Record, 140, 142, 164–169), and that they

were, in effect, decided by the latter Court against plaintiffs in error in its ruling that the contract right asserted did not exist. They are presented in this Court by the following assignment of errors (Record, 191–193):

"FIRST.

"The said Court of Civil Appeals erred "in overruling and in holding not well "taken appellant's first and sixth assign- "ments of error, which complained of the "action and ruling of the Court below in "overruling and denying the petitioner's "plea to the jurisdiction of said Court, based "upon the ground, in effect, that all the "land sued for was at the time in the cus- "tody and possession of the Circuit Court "of the United States in and for the East- "ern District of Texas, at Galveston, in "Consolidated Cause No. 198, on the equity "docket of said Court, entitled 'Nelson S. "'Easton and James Rintoul, Trustees, and "'The Farmers Loan & Trust Company, "'Trustee, vs. The Houston and Texas Cen- "'tral Railway Company *et al.*,' through "Charles Dillingham, the Receiver of said "Circuit Court in said cause, and this suit "was instituted without permission of said "Court and in deciding that notwithstand- "ing such facts the District Court of Nolan "County had jurisdiction of this cause.

" SECOND.

" The said Court of Civil Appeals erred " in overruling and holding not well taken " appellants' second assignment of error, " complaining, in effect, of the action and " ruling of the Court below in overruling " and denying and holding not well taken " petitioners' plea in abatement, based upon " the ground, in effect, that Charles Dilling- " ham, the Receiver of the Circuit Court " of the United States in and for the East- " ern District of Texas in the cause above " mentioned, was a necessary and proper " party to this suit, because all the property " sued for was in his custody and possession " as such Receiver.

" THIRD.

" The said Court of Civil Appeals erred " in overruling and holding not well taken " appellants' seventh, fourteenth, seven- " teenth and twenty-first assignments of " error, and in deciding that the acts of the " Legislature of the State of Texas, ap- " proved March 11th, 1848; February 14th, " 1852; February 7th, 1853; January 30th, " 1854, January 23d, 1856; September " 1st, 1856; February 8th, 1862; Jan- " uary 11th, 1862; September 21st, 1866; " November 13th, 1866; August 15th, " 1870, and the declaration of the con- " stitutional convention of the State of Texas

" passed August 29th, 1868, and the accept-
" ance of said laws, and the construction by
" plaintiff in error, at large expense, of an
" important part of its lines of railway prior
" to the adoption of the constitution of 1869,
" and the completion of its entire line sub-
" sequently in due time did not constitute
" a valid contract between the State of Texas
" and said railway company, entitling said
" railway company to and creating in it a
" vested right to the lands granted by said
" laws and earned by said railway company
" thereunder, including the lands involved
" in this suit, and in holding, in effect, that
" said contract could be and was impaired
" and the right of plaintiffs in error to said
" land was divested by the Constitution of
" the State of Texas adopted in 1869, con-
" trary to and in violation of the Constitu-
" tion of the United States, and especially
" Article 1, Section 10, thereof, and Section
" 1 of Article 14 of the amendments thereof.

" FOURTH.

" The said Court of Civil Appeals erred
" in not deciding that the acts of the Legis-
" lature of the State of Texas, approved
" March 11th, 1848; February 14th, 1852;
" February 7th, 1853; January 30th, 1854;
" January 23d, 1856; September 1st, 1856;
" February 8th, 1862; January 11th, 1862;
" September 21st, 1866; November 13th,
" 1866; August 15th, 1870, and the declara-

" tion of the Constitutional Convention of
" the State of Texas, passed August 29th,
" 1868, and the acceptance of said laws, and
" the construction by plaintiff in error rail-
" way company, at large expense, of an
" important part of its lines of railway prior
" to the adoption of the Constitution of 1869,
" and the completion of its entire line sub-
" sequently in due time, constituted a valid
" contract between the State of Texas and
" said railway company, entitling said rail-
" way company to and creating in it a vested
" right to the lands granted by said laws and
" earned by said railway company there-
" under, including the lands involved in this
" suit, and in not holding that said contract
" could not be and was not impaired and the
" right of plaintiffs in error was not divested
" by the Constitution of the State of Texas
" adopted in 1869, and that, in so far as the
" State Constitution attempted to impair
" such contract and divest such right, the
" same was and is contrary to and in viola-
" tion of the Constitution of the United
" States, and especially Article 1 of Section
" 10 thereof, and Section 1 of Article XIV.
" of the amendments thereof, and therefore
" void.

" FIFTH.

" The said Court of Civil Appeals erred
" in affirming the judgment of the District
" Court of Nolan County whereby the State
" of Texas had and recovered the said land

" from plaintiffs in error, and in not revers-
" ing the said judgment."

The questions presented by the first and second assignments of error do not seem to involve in any way the merits of the controversy between the parties; and the receivership referred to having terminated since the trial of the cause in the District Court they have ceased to be of practical importance and therefore we shall not argue them.

Since the Supreme Court of Texas, in their opinion refusing the writ of error, give different reasons from those given by the Court of Civil Appeals for affirming the judgment, and since, in the view of the State Supreme Court, there was no contract between the company and the State to be impaired by the Constitution of 1869, it is proper to consider whether the Federal questions involved in the decision of the Court of Civil Appeals are affected by the opinion of the Supreme Court in refusing the writ of error, and whether such opinion affects the right of this Court to determine for itself whether there was a contract impaired by the action of the State; and these considerations may be disposed of before proceeding with the discussion of the main question.

BRIEF OF ARGUMENT.

I.

The judgment of the Court of Civil Appeals—the Court having the record and to which the writ of error went—is the judgment under review, and not the opinion of the State Supreme Court given upon its refusal to grant a writ of error.

Under the appellate judiciary system of Texas all appeals from courts of record must be taken in the first instance to the Court of Civil Appeals, as provided by Article 996, Revised Statutes 1895, which reads as follows:

> " The appellate jurisdiction of the Courts " of Civil Appeals shall extend to civil cases " within the limits of their respective dis- " tricts (1) of which the district courts have " original or appellate jurisdiction; (2) of " which the County Court has original " jurisdiction; (3) of which the County " Court has appellate jurisdiction when " the judgment or amount in controversy, " or the judgment rendered, shall exceed " $100, exclusive of interest and costs. The " judgment of the Courts of Civil Appeals " shall be conclusive in all cases on the facts

" of the case, and a judgment of such courts
" shall be conclusive on the law and fact,
" nor shall a writ of error be allowed thereto
" from the Supreme Court in the following
" cases, to wit: (1) In civil cases appealed
" from a County Court or from a District
" Court when, under the Constitution, the
" County Court would have had original or
" appellate jurisdiction to try it, except in
" probate matters and in cases involving
" the revenue laws of the State or the va-
" lidity of a statute; (2) all cases of bound-
" ary; (3) all cases of slander and divorce;
" (4) all cases of contested elections of every
" character other than for State officers, ex-
" cept where the validity of the statute is
" attacked by the decision."

Appellate jurisdiction of the Supreme Court of the State is defined by Article 940 of the same statute in accordance with the Constitution, as follows:

" The Supreme Court shall have appel-
" late jurisdiction co-extensive with the
" limits of the State which shall extend to
" questions of law arising in all civil cases of
" which the Courts of Civil Appeals have
" appellate but not final jurisdiction."

And the first clause of Article 941 of the same statute provides that " all causes shall be car-

" ried up to the Supreme Court by writs of error " upon final judgment," etc., and not on judgments reversing and remanding causes except in a specified class of cases unnecessary to notice here. The practice with respect to applications to the Supreme Court for writs of error to the Courts of Civil Appeals is governed by Article 942 of the statute, which reads as follows:

> " Any party desiring to sue out a writ of " error before the Supreme Court shall pre- " sent his petition addressed to said Court, " stating the nature of his case and the " grounds upon which the writ of error is " prayed for, and showing that the Supreme " Court has jurisdiction thereof; and the " petition shall contain such other requisites " as may be prescribed by the Supreme " Court. The petition shall be filed with " the Clerk of the Court of Civil Appeals " within thirty days from the overruling of " the motion for rehearing, and thereupon " the said Clerk of the Court of Civil Ap- " peals shall note upon his record the filing " of said application, and shall forward to " the Clerk of the Supreme Court the said " application, together with the original " record in the case, and the opinions of the " Court of Civil Appeals and the motion " filed therein, and certified copies of the " judgments and orders of the Court of Civil

" Appeals; provided, that the party apply-
" ing for the writ of error shall deposit with
" the Clerk of the Court of Civil Appeals a
" sum sufficient to pay the expressage or
" carriage of the said record to and from the
" Clerk of the Supreme Court, which sum
" shall be charged as costs in the suit. If
" the writ of error be granted and the plaint-
" iff in error has given no bond, then the
" Supreme Court in granting the writ shall
" specify what bond shall be given, and the
" plaintiff in error shall file said bond
" in the trial Court to be approved by the
" Clerk of said Court, and a certified copy
" thereof shall at once be transmitted to the
" Supreme Court, and upon the filing of
" said certified copy the Clerk of the Su-
" preme Court shall issue the citation in
" error as may be prescribed by the rules of
" the Supreme Court."

and is further regulated by Rule 1 adopted by the Supreme Court for its government (87 Tex., p. XXXVII.).

The succeeding article of the statute (943) is the only other statutory provision governing the Supreme Court with respect to applications for writs of error to the Courts of Civil Appeals, and which reads as follows :

" If it shall appear to the Supreme Court

> " from an inspection of the petition and
> " record that there is error in said judgment
> " of the Courts of Civil Appeals, it shall
> " grant a writ of error, returnable in thirty
> " days, in such manner as may be pre-
> " scribed by said Court."

Hence, upon the refusal by the Supreme Court of an application for writ of error, the judgment of the Court of Civil Appeals becomes final. By refusing the writ of error it declines to review the judgment of the Court of Civil Appeals, and the judgment of the latter Court thereupon becomes the judgment of the highest Court of the State in which a decision in the suit could be had, and is, therefore, the judgment to be reviewed by this Court where its writ of error will lie, as was recognized in Bacon vs. Texas, 163 U. S., 207, where it was said (p. 215):

> " The first question which arises in this
> " case is in regard to our jurisdiction to review
> " the judgment of the Court of Civil Ap-
> " peals of the State of Texas. Some question
> " was made in regard to the regularity and
> " sufficiency of the writ of error from this
> " Court to the Court of Civil Appeals, as that
> " Court is not the highest Court in the State.
> " We think, however, the criticism is not well
> " founded. So far as this case is concerned,

" that Court is the highest Court of the State
" in which a decision in this suit could be
" had. An application was made to the Su-
" preme Court of the State of Texas for a
" writ of error to the Court of Civil Appeals
" for the Second District by the defendants in
" the court below, after judgment in the latter
" court, for the purpose of reviewing the judg-
" ment of that Court, but the Supreme Court
" denied the application, *and thus prevented by*
" *its action a review by it of the judgment of*
" *the Court of Civil Appeals.* The judgment
" of that Court has, therefore, become the
" judgment of the highest Court of the State
" in which a decision in the suit could be had,
" and this Court may, so far as this point is
" concerned, re-examine the same on writ of
" error, under the provisions of Section 709,
" Revised Statutes of the United States."

We submit that the judgment of the Court of Civil Appeals is the only judgment for review by this Court, and that since the Supreme Court refused the application for a writ of error its opinion is to be left out of view entirely, and, indeed, is not properly a part of the record in this Court. There is no statute of the State or rule of the State courts that makes it any part of the record in the Court of Civil Appeals. By Article 944 of the Revised Statutes it is provided that:

> " The Supreme Court shall, from time to
> " to time, make and promulgate suitable
> " forms, rules and regulations for carrying
> " into effect the foregoing articles relating to
> " the jurisdiction and practice of the Su-
> " preme Court ; "

and by Article 947 it is further provided that ;

> " The Supreme Court shall have power to
> " make, establish and enforce all necessary
> " rules of practice and procedure not incon-
> " sistent with the laws of this State for the
> " government of said Court and all other
> " courts of the State, so as to expedite the
> " dispatch of business in said courts."

While, as we have seen, the statute (Articles 942 and 943) provides for the issuance of the writ of error where the Supreme Court, upon inspection of the application therefor, finds error in the judgment of the Court of Civil Appeals, it makes no provision for notifying the Court of Civil Appeals of the Supreme Court's action in refusing the application, but leaves that matter to be governed by rules to be established by the Supreme Court in the exercise of the power conferred by Articles 944 and 947 above quoted. In pursuance thereof, the Supreme Court established a rule as follows (Rule 4 for the Supreme Court, 87 Texas, p. XXXVIII.) :

"Upon a refusal by this Court of an "application for a writ of error, the Clerk of "this Court shall transmit, with the least "practicable delay, to the Clerk of the Court "of Civil Appeals to which the writ of "error was sought to be sued out, a certified "copy of the order of this Court denying "such application; and shall return all the "file papers of that Court to the Clerk there- "of, but shall not return the petition for writ "of error."

It is to be observed that no provision is made for sending down any opinion that the Supreme Court may file, and only the order refusing the application is to be certified, while the petition itself, the rule expressly requires, shall remain in the Supreme Court. It appears from the record in this cause (pp. 187, 188) that the order of the Supreme Court refusing the application for writ of error was certified by the Clerk of that Court on the first day of May, 1897, and filed in the Court of Civil Appeals on the 13th day of that month. It appears, however, that certified copies of the opinion of the Supreme Court (Record, 185–187), delivered when the application was received, was prepared and certified by the Clerk of that Court on June 5th, 1897, and was filed in the Court of Civil Appeals on the 11th day of the

same month—nearly a month after the order refusing the writ of error was filed, and the petition to the Supreme Court for writ of error, as it appears in the record (pp. 140 to 184), is a copy of the petition as filed in the Court of Civil Appeals August 10th, 1896 (Record, 184), as required by Article 942, Revised Statutes, above quoted, and which was then transmitted to the Supreme Court and filed there August 7th, 1896; and that this copy is found in the record, and is the one certified by the Clerk of the Supreme Court May 6th, 1897 (Record, 187), and filed in the Court of Civil Appeals May 24th, 1897, about ten days after the order refusing the writ of error was filed in the Court of Civil Appeals (Record, 187, 188).

From the provisions of the statute and the rules governing the subject it is evident that the opinion of the Supreme Court and the petition for writ of error are not properly parts of the record to be considered by this Court. The record proper consists of the record in the Court of Civil Appeals, which would include, of course, the order of the Supreme Court refusing the writ of error. Since, under the laws of the State, parties invoking the jurisdiction of this Court in

a case of this character, may apply to the State Supreme Court for a writ of error, though not entitled to the writ as a matter of right, it may be necessary that the record in this Court should show that the State Supreme Court refused to take jurisdiction of the case "and thus prevented, "by its action, a review by it of the judgment of "the Court of Civil Appeals," and that thereby the judgment of the latter court had "become the "judgment of the highest Court of the State in which a decision in the suit could be had." When this is shown, as in this case (Record, 187–188) by the order of the Supreme Court, the record in this Court is complete, and it will be presumed, if the question is made, that an application was duly made to the State Supreme Court presenting all the grounds of error here complained of in the judgment of the Court of Civil Appeals.

II.

When this Court is called upon to determine whether an alleged contract has been impaired by a State law it will inquire whether such contract exists, and will determine that question for itself independently of the judgment of the State Court.

Since the State Supreme Court, in its opinion, held that the company had no contract for the land grant in aid of the Austin line, it is perhaps proper that we should discuss the right of this Court to determine that question for itself without regard to the opinion of the State Court, although we contend under the preceding point that the opinion of the State Supreme Court is not properly a part of the record in this cause and is to be left out of view in considering the questions involved. But little need be said, however, in support of the proposition now submitted. It is too well settled by repeated decisions of this Court that in the inquiry whether State legislation impairs the obligation of contracts, and thereby violates the Federal Constitution, this Court must decide for itself whether any valid

contract existed, and in making up its judgment on that question it is not controlled by the decisions of the State Court (*State Bank of Ohio vs. Knoop, 16 How., 369, 391; Ohio Life Ins. Co. vs. DeBolt, 16 How., 416, 432; Jefferson Branch Bank vs. Skelley, 1 Black, 436; Bridge Proprietors vs. Hoboken Co., 1 Wall., 145; Delmas vs. Ins. Co., 14 Wall., 661; University vs. People, 99 U. S., 323; Louisville Gas Co. vs. Citizens' Gas Co., 115 U. S., 683; Hoadley vs. San Francisco, 124 U. S., 639*). "The existence of the " contract or right is part of the Federal question " itself" (124 U. S., 645).

In *Jefferson Branch Bank vs. Skelley* this Court said (1 Black, 443):

> " It has never been denied, nor is it " now, that the Supreme Court of the " United States has an appellate power " to revise the judgment of the Supreme " Court of a State whenever such a Court " shall adjudge that not to be a contract " which has been alleged, in the forms of " legal proceedings, by a litigant, to be " one within the meaning of that clause of " the Constitution of the United States " which inhibits the State from passing any " law impairing the obligation of contracts. " Of what use would the appellate power be

" to the litigant who feels himself aggrieved
" by some particular State legislation if
" this Court could not decide, independently
" of all adjudication by the Supreme Court
" of a State, whether or not the phraselogy
" of the instrument in controversy was ex-
" pressive of a contract and within the pro-
" tection of the Constitution of the United
" States, and that its obligation should be
" enforced, nothwithstanding a contrary con-
" clusion by the Supreme Court of a State?
" It never was intended, and cannot be sus-
" tained by any course of reasoning, that
" this Court should, or could with fidelity
" to the Constitution of the United States,
" follow the construction of the Supreme
" Court of a State in such matter, when it
" entertained a different opinion; and, in
" forming its judgment in such a case, it
" makes no difference in the obligation of
" this Court, in reversing the judgment of
" the Supreme Court of a State upon such a
" contract, whether it be one claimed to be
" such under the form of State legislation,
" or has been made by a covenant or agree-
" ment by the agents of a State by its
" authority."

And in *Delmas vs. Insurance Co.* it was again said (14 Wall., 668):

" Besides, this Court has always jealously
" asserted the right, when the question be-
" fore it was the impairing of the obliga-

" tion of a contract by State legislation, to
" ascertain for itself whether there was a
" contract to be impaired. If it were not so,
" the constitutional provision could always
" be evaded by the State courts giving such
" construction to the contract or such de-
" cisions concerning its validity as to render
" the power of this Court of no avail in
" upholding it against unconstitutional State
" legislation."

III.

By the acceptance of the various acts of the Legislature of Texas incorporating and relating to it and relating to the land grant, thereby and by the general laws of the State made to it in consideration of the construction of its road, and by entering upon and in due time completing an important part of its line before the adoption of the Constitution of 1869, and by restoring to its former stockholders, as required by the Acts of January 11th, 1862, their rights which had been foreclosed, the railway company acquired, under such laws as well as under the ordinances and declarations of the constitutional convention of 1868, a contract and vested right to the lands in question, which contract and right could not be impaired or divested by the Constitution of 1869, or by any other pretended law or act of said State, contrary to the Constitution of the United States, especially Article 1, Section 10, thereof, which denies to the States power to pass any law impairing the obligation of contracts, and Section 1 of

Article XIV. of the amendments thereof, prohibiting any State from depriving any person of property without due course of law.

By the Act of March 11th, 1848, incorporating the company, the Houston and Texas Central Railway Company was not only authorized to construct the main line of the railroad therein specified, but was expressly invested "*with the* "*privilege of making, owning and maintaining* "*such branches*," as it should deem expedient. That this privilege authorized the construction of the line to Austin of course admits of no question. By Section 14 of the special Act of February 14th, 1852 (*post*, p. XIV.), there was granted to the company eight sections of land for every mile of railroad it should complete. This grant was without restriction or limitation with respect to the lines thus aided, and therefore extended to branches as well as main lines.

By the special Act of February 7th, 1853 (*post*, pp. XVIII.–XIX.), the company was expressly authorized and empowered "to make and con- "struct simultaneously with the main railway "described in the original acts establishing said

" company a branch thereof towards the City of " Austin," etc.

By the general Act of January 30th, 1854 (*post*, p. XIX.), there was, as we have seen, granted to all railroad companies theretofore chartered, and which should construct a section of twenty-five miles or more of railroad, sixteen sections of land for every mile of road so constructed and put in running order. This act, however, provided in Section 12 (*post*, p. XXVIII.) that any company then entitled, as this company was, to a grant of eight sections of land per mile, and which should accept the provisions of the act, should not be entitled to receive the grant thereby made for any branch road. Hence, this company, having already a grant of eight sections per mile, could not claim, by virtue of the general Act of January 30th, 1854, alone and unaided by subsequent legislation, the grant made by that act generally for anything except its main line. But this situation was changed by the special act of January 23d, 1856, entitled " An Act for the relief of the Galveston and Red " River Railway Company and supplementary to " the several acts incorporating said company." Up to the time of the passage of this act the

company had the general branching privileges conferred, as we have seen, by its original act of incorporation, including the right to construct a branch line to the City of Austin expressly conferred by the special Act of February 7th, 1853, but by reason of the limitations contained in Section 12 of the general Act of January 30th, 1854, already referred to, the grant of sixteen sections per mile by that act did not extend to branch lines. In order, therefore, that the company should receive the grant of sixteen sections per mile for the Austin line, it became necessary to modify the limitations contained in the Act of 1854 with respect to branch lines, or confer the grant by further legislation. Therefore, the special Act of January 23d, 1856, was enacted, by which the rights, benefits and privileges of the general Act of January 30th, 1854, were expressly extended to the company without any limitation with respect to branch lines but upon these conditions: (1) That the company should maintain its principal office and keep its records on its line of road; (2) that a majority of its directors should reside in the State, and that its meetings for election of directors and officers should be held in the State; (3) that it should

complete its main line to a certain point before commencing the branch road; (4) that it should submit itself to the general Act of February 7, 1853, regulating railroads; and (5) the very important condition imposed by Section 5 of the act that the company should "yield all general "branching privileges, except such as are ex- "pressly granted by the provisions of its "charter, to certain points, and shall be required "to spend only so much of its capital stock "upon any branch as shall be expressly sub- "scribed to such branch, and shall not spend "upon its trunk any moneys subscribed to any "branch" (*post*, p. XXXIV.). The branching privileges then enjoyed by the company were general, and Austin was the only "certain "point" specified in the charter of the company with reference to the construction of branches. The only provisions in reference to branches contained in the acts theretofore passed are those found in Section 2 of the original act of incorporation (*post*, p. I.) conferring the general branching privileges and the authority expressly conferred in Section 2 of the special Act of February 7th, 1853, (*post*, p. XIX.), to construct a branch to the City of Austin. It

seems evident, therefore, that the Austin branch was the one contemplated by Section 5 of the Act of January 23d, 1856, and that the right to construct this branch was thereby distinctly preserved, and that the grant of sixteen sections per mile, made by the general Act of January 30th, 1854, was extended by the special act of January 23, 1856, to the Austin branch. There could be no other object in expressly applying the benefits of the Act of January 30, 1854, to the company. It was already entitled, as we have seen, to the benefits of that act for the construction of its main line. It would have been idle and useless, therefore, for the Legislature to have extended the benefits of that act to the company, as was done by the special act referred to, unless it was for the purpose of extending to the Austin line the authority to construct, which was expressly reserved by the special act. Effect must be given to the provision, and the only effect that can be given was the extension of the right to lands for the construction of the Austin line. If it had not that effect, then it had no effect, and the Legislature meant nothing by it. Section 5, as we have seen, required the company

to yield all branching privileges except for the line to Austin, and this evinces the purpose of the Legislature not to grant lands for branches generally, but only for the main line and the line to Austin. But for Section 5 the company might have constructed, under Section 2 of its original act of incorporation, branches to various points, and, under the Act of 1856, could have claimed the land grant therefor; and it was to guard against this that Section 5 was evidently incorporated in the act. There could have been no other reason for the incorporation of Section 5. The policy of the State at that time was not averse to the construction of railroads, as is well known, and as is evidenced by the legislation of the period; and the construction of a multitude of branches by this company, if it could have been accomplished without State aid, would have been welcomed by the State and the people. But the State was not willing to grant lands for construction without limit and without knowing the particular lines to be constructed, and for which the land grant might be claimed. Hence, by Section 5, the State required the company to yield all branching privileges except for the Austin line, thereby confining the grant to the

main line and to the branch line to Austin and placing a limit upon the grant which the company might otherwise claim. That the express extension of the general Act of January 30, 1854, by the special Act of January 23, 1856, was intended to aid and encourage the construction of the line to Austin, and that such construction was contemplated thereby, is further evidenced by the provisions of Section 5, requiring the company to spend on the branch only the money subscribed for such branch, and on the trunk only the money subscribed therefor.

In construing the general Act of January 30, 1854, and a subsequent special act extending the benefits thereof to a company subsequently incorporated, the Supreme Court of Texas, in the recent case of *Quinlan vs. H. & T. C. Ry. Co., 89 Texas, 356*, in speaking of the legislative policy of that period, said (p. 369):

> "The legislation of that era, for the encouragement of the construction of railroads, makes it manifest, we think, that the legislative policy was, as to companies then chartered, to confer by general laws the privilege of earning lands, and in granting new charters to make such provisions for the companies thereby created

" as should be demanded by such special " conditions as should exist at the time of " the grant. That such was the policy of the " Legislature which passed the statute in " question is shown by the subsequent leg- " islation at the same session. There were " seven special charters granted in 1854, in " all of which special provisions were made " for land grants. The same policy and " practice were pursued by subsequent Leg- " islatures while the Act of 1854 continued " in force."

It was not the purpose of the Legislature, in passing the general Act of 1854, to extend the grant thereby made to encourage the construction of branch roads. But in 1856 the Legislature of that year conceived that " special conditions " did exist at that time which demanded that the grant of sixteen sections per mile should be made, and therefore passed the special Act of January 23d of that year, removing the restrictions contained in Section 12 of the Act of January 30th, 1854, with respect to branch lines, so far as this company was concerned, and expressly extending the land grant to the company for its Austin branch as well as its main line.

But, if there should be any doubt respecting the right of the company to lands for the con-

struction of its western division to Austin before, it was removed by the special act approved September 21st, 1866, entitled "An Act granting "lands to the Houston and Texas Central Rail-"way Company" (*post*, p. LVII.). By this act a specific grant was made to said company of "sixteen sections of land of 640 acres each "for every mile of road it has constructed or "may construct and put in running order "in accordance with the provisions of the "charter of said company." It has not been, as far as we are aware, denied by the State or any of its officers, and we can conceive of no grounds upon which it could be denied, that this act granted lands for the construction of the Austin line as well as the main line of the company. The only thing urged against this act is that the company failed to construct its line as expeditiously as the act required; and the District Court inquired into the facts as to the time of construction, and held that the company lost the right to the land granted by the act through its failure, as found by that Court, to construct its line within the time therein specified (Ninth Conclusion of Law, Record, 33). There are several effectual answers to this contention:

The first is that the inquiry was not open to the Court, because the fact of construction was ascertained and determined by the executive officers of the State charged with the administration of the laws granting lands to railroads and invested with the exclusive jurisdiction to determine the fact. By Section 2 of the Act (*post*, p. LIX.), as well as by the other laws granting lands to railroad companies, it was made the duty of the Governor, upon completion from time to time of sections of twenty-five miles or more of the road, to appoint an engineer to examine it, and that, upon the report of the engineer showing that the road had been constructed in accordance with the provisions of the charter of the company and the general laws of the State, it should be the duty of the Commissioner of the General Land Office to issue to the company certificates to the lands granted, and that thereupon the company should have the right to have any unappropriated public lands surveyed, and to locate the certificates thereon. In the exercise of the power thus conferred the Governor, in obedience to the act, appointed an engineer (Record, 56, 57), who inspected the road and who reported that it had been completed in

accordance with the law (Record, 57–63). Upon this report the certificates were issued by the Commissioner of the General Land Office under which the lands in question were surveyed and the locations made, as shown by the admissions of the State (Record, 48), and as found by the District Court (Record, 17), and that the company has ever since paid the taxes assessed by the State thereon. In short, it is not disputed that the executive department, whose duty it was under the law, and who were invested by law with exclusive and final jurisdiction in that behalf, ascertained and determined the fact of construction and compliance with the provisions of the law, and in the exercise of their lawful authority thereupon issued the certificates in question. We submit that this is an end of the matter. The question of the time of construction was purely one of fact. It is not evidenced by any legislative enactment declaring the fact and assuming to enforce a forfeiture, nor by any judicial decree in a proceeding for that purpose. The legislative, the judicial and the registration records of the State, beyond which certainly the citizen ought not to be required to go, are absolutely silent. It is a fact, resting wholly within

the memory of man, and by the great lapse of time it must have been, when the cause was tried in the Court below, well-nigh, if not entirely, lost. The road had been constructed and in full operation for many years. The facts upon which the Executive Department acted were not required by law to be preserved. Their jurisdiction was exclusive and the finding made final by law; and what the evidence before them was as to the time of construction is not known.

That the findings of fact by the Executive Department with respect to matters such as these, entrusted to that Department, are conclusive and not open to review by the Courts, has been settled by repeated decisions of this Court, as well as by the Supreme Court of Texas.

United States vs. Arredondo, 6 Peters, 691; United States vs. Burlington, etc., R. Co., 98 U. S., 334, 341; Kansas Pacific R. Co. vs. Atchison, etc., R. Co., 112 U. S., 414, 418; Maxwell Land Grant Case, 121 U. S., 325, 381; Colorado Coal Co. vs. United States, 123 U. S., 307, 316; United States vs. Budd, 144 U. S., 154, 161; United States vs. Alabama R. Co., 142 U. S., 615, 621; United States vs. California, etc., Land Co., 148 U. S., 31, 43; United States vs. Union Pacific R.

Co., 148 U. S., 562; United States vs. Denver, etc., R. Co., 150 U. S., 1; Chandler vs. Calumet Mining Co., 149 U. S., 79; United States vs. Dalles, etc., Co., 7 U. S. App., 297; Heirs of Holloman vs. Peebles, 1 Tex., 673, 699; Hancock vs. McKinney, 7 Texas, 384, 440; Jenkins vs. Chambers, 9 Tex., 167, 230; Styles vs. Gray, 10 Tex., 503, 506; Ruis vs. Chambers, 15 Tex., 586, 590.

Without pursuing this point further we beg to refer to our argument in support of the petition to the Supreme Court of Texas for writ of error contained in the record, pages 170 to 178.

Another answer to the claim that the road was not constructed within the time required by the act is that the forfeiture for failure to construct, if there was such failure, had not been declared by any judicial proceeding for that purpose, or by any legislative action equivalent to a judgment of office found at common law, and it is entirely clear that one of these are necessary —a proposition also settled by repeated decisions of this Court (*S. L., etc., R. Co. vs. McGee, 115 U. S., 469, 473, 474; Van Wyck vs. Knevals, 106 U. S., 360; Bybee vs. Oregon, etc., R. Co., 139 U. S., 663, 675*), as well as by the Supreme

Court of Texas (*G. H. & S. A. Ry. Co. vs. State, 81 Tex., 572.*)

See, also, the argument upon this point in support of the petition to the Supreme Court of Texas for writ of error as contained in the record, pages 158–163.

Another and still more conclusive answer to the contention is that the ground of forfeiture, if any existed, was waived, and the default of the company with respect to construction was expressly excused by the State—first, by the ordinance passed December 23, 1868, by the constitutional convention (*post*, p. LXVII.), which declared "that the Houston and Texas Central Rail-
" way Company shall not suffer any forfeiture of
" any right secured to it by existing laws by reason
" of the failure of said company to construct and
" put in running order their said railway to the
" Town of Calvert, in Robertson County, by the
" first day of January, A. D. 1869, as required by
" the Act of the 21st of September, A. D. 1866, pro-
" vided said railway shall be constructed and put
" in good running order for the use of the public,
" to said Town of Calvert, by the first day of
" April, A. D. 1869;" and, second, by the special

Act of August 15, 1870, which provided in Section 4 (*post*, p. LXXIII.) as follows:

> "No forfeiture of any of the rights or
> "privileges secured to it by existing laws
> "shall be enforced against the Houston and
> "Texas Central Railway Company by rea-
> "son of its failure to comply with the con-
> "ditions as to construction imposed by the
> "first section of the Act of the 21st of Sep-
> "tember, A. D. 1866, entitled 'An Act
> "'granting lands to the Houston and Texas
> "'Central Railway Company;' but the said
> "company shall have and enjoy all the
> "rights and privileges secured to it by
> "existing laws the same as if the conditions
> "embraced in the first section of the said
> "Act of the 21st of September, A. D. 1866,
> "had been in all respects complied with,
> "provided that the land grant to said com-
> "pany shall cease unless said company shall
> "complete their main trunk east of the
> "Brazos River to Richland Creek in Navarro
> "County within twelve months from the
> "first day of October, A. D. 1870, and shall
> "also complete their road to the City of
> "Austin within two years after the passage
> "of this act."

The requirement of this act respecting the time of construction was fully complied with by the company (see Tenth and Thirteenth Findings of fact, Record, 30, 31).

In view of this it is not very surprising that the Court of Civil Appeals did not sustain the conclusion of the District Court that the company had lost its right to the lands granted by the Act of September 21st, 1866, by the alleged failure to complete its road within the time required by that act; but, as we have seen, based its judgment upon an entirely different ground; and, therefore, perhaps we should ask pardon of the Court for saying so much as we have said in reference to the alleged failure of the company to comply with the requirements of the act respecting the construction of its line within a specified time.

So it clearly appears that the company was granted by the State, prior to the adoption of the Constitution of 1869, sixteen sections of land per mile for the construction of the Austin line—first, by the Special Act of January 23, 1856, confirmed and put beyond question by the Act of September 21, 1866. The rights of the company, under its acts of incorporation, to the lands granted it by the State, were preserved throughout by extensions of time, as occasion required, in which to comply with the conditions respecting the rate of construction. By the Act of September 1, 1856,

the failure of the company to complete the second section of its road within one year after the completion of the first section was waived, and again by the Act of February 4, 1858, the company was granted further time within which to comply with the requirements of the law in reference to construction; and, again, by the Act of February 8, 1861, it was given until January 30, 1863, to perform the work required of it; but before this time expired the war commenced, and during that period the General Laws of January 11, 1862, were passed, extending the time upon the conditions therein specified until two years after the close of the war. This condition was, as we have seen (*ante*, p. 19–20), that the extension thus granted to all companies should inure to the benefit of this company only in the event that it should restore the rights of the stockholders which had been foreclosed as stockholders of the company. The company complied with this condition (Record, p. 29–32, 80), and it was alleged in the answer (Record, 18) that the holders of 7,736 shares of the stock availed themselves of the advantages given by this condition. Following this, further time was given by the Special Act of September 21, 1866, and again by

the General Act of November 13, 1866 (*post*, p. LXI.); and then again by the ordinance of December 23, 1868, passed by the constitutional convention of the State, and already referred to, and all default in reference to construction was fiaally waived in Section 4 of the Special Act of August 15, 1870 (*post*, p. LXXIII.).

Prior to the adoption of the Constitution of 1869 the company acquired the Washington County Railroad, and the convention which framed that Constitution on August 29th, 1868 (*post*, p. LXIII.), ratified and confirmed the purchase of that road, and declared "that the "Washington County Railroad is hereby made "and declared to be a branch of the Houston and "Texas Central Railroad, and shall henceforth be "known and called the 'Western Branch of the "'Houston and Texas Central Railway Company,' "and shall be controlled and managed by the said "Houston and Texas Central Railway Com-"pany;" and then provided that the company should "have the right to extend the said west-"ern branch of their road from the Town of "Brenham, in Washington County, to the City "of Austin, in Travis County, by the most "eligible route as near an air line as may be

" practicable." And by Section 4 the ordinance further " provided that all laws and parts of laws " concerning said Houston and Texas Central " Railroad or said Washington County Railroad, " not in conflict with the foregoing provisions, " shall be considered as still in force."

When, therefore, the Constitution of 1869 was adopted, the company, at a necessarily great expense, had completed and had in operation five sections of twenty-five miles each of its main line (Record, p. 30), and, by the acquisition of the Washington County Railroad, had in operation that part of the Austin branch extending from a junction with the main line at Hempstead to the Town of Brenham directly towards Austin.

From all this it is evident that the company had been unmistakably granted by more than one act of the Legislature sixteen sections of land per mile for the construction of its Austin branch as well as its main line, and that it had accepted such grant and earned the same by the construction of an important, and indeed the principal, part of the railway lines which the State, by such grant, intended to promote before the Constitution of 1869 was adopted.

That this state of facts presents a contract

between the company and the State within the protection of the Constitution of the United States has long since ceased to be an open question (*Fletcher vs. Peck, 6 Cranch, 87, 137; New Jersey vs. Wilson, 7 Cranch, 164; Terrett vs. Taylor, 9 Cranch, 43; Town of Pawlett vs. Clarke, 9 Cranch, 292; Dartmouth College Case, 4 Wheat., 518; Society, etc., vs. New Haven, 8 Wheat., 464; Gordon vs. Appeal Tax Court, 3 Howard, 133; State Bank of Ohio vs. Knoop, 16 How., 369; Dodge vs. Woolsey, 18 How., 331; Jefferson Branch Bank vs. Skelley, 1 Black, 436; McGee vs. Mathis, 4 Wall., 143; Van Hoffman vs. City of Quincy, 4 Wall., 552; Home of the Friendless vs. Rouse, 8 Wall., 430; Wilmington R. R. vs. Reid, 13 Wall., 264; White vs. Hart, 13 Wall., 652; Davis vs. Gray, 16 Wall., 203; Humphrey vs. Pegues, 16 Wall., 244; Farrington vs. Tennessee, 95 U. S., 679; New Jersey vs. Yard, 95 U. S., 104; Moore vs. Robbins, 96 U. S., 530; United States vs. Schurz, 102 U. S., 378; Asylum vs. New Orleans, 105 U. S., 362; New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650; New Orleans Water Works vs. Rivers, 115 U. S., 674; Louisville Gas Co. vs. Citizens' Gas Co., 115*

U. S., 683; St. Tammany Water Works Co. vs. New Orleans Water Works Co., 120 U. S., 64; Noble vs. Union River Logging Co., 147 U. S., 165; Monongahela Navigation Co. vs. United States, 148 U. S., 312). And the protection extends to executory as well as executed contracts (*Fletcher vs. Peck, 6 Cranch, 136, 137; Hall vs. Wisconsin, 103 U. S., 5*); and to implied as well as express contracts (*Fisk vs. Jefferson Police Jury, 116 U. S., 131*), and to contracts to which the State is a party as well as to contracts between private individuals (*United States ex rel. Wolff vs. New Orleans, 103 U. S., 358; Hall vs. Wisconsin, 103 U. S., 5; Davis vs. Gray, 16 Wall., 203*). And the protection is as effectual against the impairment of the contract by a State Constitution as by a statute or any other act of the State (*M. & M. R. Co. vs. McClure, 10 Wall., 511; White vs. Hart, 13 Wall., 652; Delmas vs. Ins. Co., 14 Wall., 661; Gunn vs. Barry, 15 Wall., 610; Williams vs. Louisiana, 103 U. S., 637; Durkee vs. Board of Liquidation, 103 U. S., 646; New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650; Bier vs. McGee, 148 U. S., 140; Davis vs. Gray, 16 Wall., 203*).

In *Davis vs. Gray*, *supra*, this Court had occasion to consider the effect of the Constitution of 1869, upon land grants theretofore made by the State of Texas in aid of the construction of railroads, where it was contended by the State that such laws were repealed by that Constitution notwithstanding the protection afforded by the Constitution of the United States to contracts created thereby and arising thereunder. In that case it was said (16 Wall, p. 232):

> "That the act of incorporation and the "land grant here in question were contracts "is too well settled in this Court to require "discussion (Fletcher vs. Peck, 6 Cranch, "137; New Jersey vs. Wilson, 7 *Id.*, 166; "Dartmouth College vs. Woodward, 4 "Wheat., 518; State Bank vs. Knoop, 16 "How., 369). As such they were within "the protection of that clause of the Con-"stitution of the United States which de-"clares that no State shall pass any law "impairing the obligation of contracts. The "ordinance of 1869 and the Constitution "adopted in that year, so far as they con-"cern the question under consideration, are "nullities and may be laid out of view (Van "Hoffman vs. The City of Quincy, 4 Wall., "535). When a State becomes a party to a "contract, as in the case before us, the same "rules of law are applied to her as to pri-

" vate persons under like circumstances.
" When she or her representatives are prop-
" erly brought into the forum of litigation,
" neither she nor they can assert any right
" or immunity as incident to her political
" sovereignty (Curran vs. State of Arkansas,
" 15 How, 308)."

That case, dealing as it does with the identical Constitution and many other questions involved in this case, is especially important, since, as we submit, it is decisive in our favor of the questions now presented. It placed beyond controversy in this Court, and should have put at rest everywhere, the proposition that the State of Texas, by adopting the Constitution of 1869 (as it then claimed, and as the State authorities persist in claiming), impaired the contract right acquired by railroad companies under their charters and the laws theretofore adopted to the lands granted to them by the State. It also seems to have satisfied every one, except the District Judge who tried the case, that the requirement of the laws in question with respect to construction were merely *conditions subsequent* annexed to the grant, and that the lands were not forfeited without a direct proceeding for that pur-

pose instituted before they were earned. Upon this point the Court said (16 Wall., 229, 230):

"The title of the company is therefore "unaffected by the breach of any condition "annexed to the grant.

"But suppose there had been such "breaches, as is insisted by the counsel for "the appellants, the result must still be the "same.

"Except as to a small portion of the land "in question the legal title is yet in the "State. Whatever may be the right of the "company it is wholly equitable in its "character. With a few exceptions, which "have no applicability in this case, the "same rules apply in equity to equitable "estates as are applied at law to legal es-"tates. They are alike descendible, devis-"able, alienable and barrable.

"There is a wide distinction between a "condition precedent, where no title has "vested and none is to vest until the condi-"tion is performed, and a condition subse-"quent, operating by way of defeasance. "In the former case equity can give no re-"lief. The failure to perform is an inevi-"table bar. No right can ever vest. The "result is very different where the condition "is subsequent. There equity will inter-"pose and relieve against the forfeiture "upon the principle of compensation, where "that principle can be applied, giving dam-

" ages, if damages should be given, and the " proper amount can be ascertained. By " the common law a freehold estate could " not be created without livery of seizin, and " it could not be determined without some " act *in pais* of equal notoriety. Conditions " subsequent are not favored in the law, and " when they are sought to be enforced in an " action at law there must have been a re- " entry, or something equivalent to it, or " the suit must fail. The right to sue at " law for the breach is not alienable. The " action must be brought by the grantor or " some one in privity of blood with him. " In *Dumper's case* it was decided that a " condition not to alien without license is " finally determined by the first license " given.

" Here the controlling consideration is " that the performance of all the conditions " not performed was prevented by the State " herself. By plunging into the war, and " prosecuting it, she confessedly rendered it " impossible for the company to fulfill dur- " ing its continuance. This is alleged in " the bill, and admitted by the demurrer."

And at page 228 :

" The real estate of a corporation is a dis- " tinct thing from its franchises. But the " right to acquire and sell real estate is a " franchise, and the right to acquire the par-

" ticular real estate designated in the
" charter of this company, and here in
" question, is within that category. It
" might, therefore, well be doubted whether
" this right could be taken from the com-
" pany without an appropriate proceeding
" instituted for that purpose, and prosecuted
" to judgment by the State. But the view
" which we take of the case renders it un-
" necessary to pursue the subject."

The subject of the paragraph last quoted was pursued by this Court in *Van Wyck vs. Knevals, 106 U. S. 360*; *S. L., etc., R. Co. vs. McGee, 115 U. S., 469–473*, and in *Bybee vs. Oregon, etc., R. Co., 139 U. S., 663, 675*, and clearly ruled against the views of the District Judge. Indeed, his ruling upon the point was in the face of a prior decision of the State Supreme Court (*G., H. & S. A. Ry. Co. vs. State of Texas, 81 Tex., 572*), and of course was not sustained by either the Court of Civil Appeals or the Supreme Court in this case.

This company had not merely organized and commenced the work it was incorporated to carry on, but had completed the principal part of its line before the Constitution of 1869 was adopted. As shown by the findings of the District Judge

(Record, p. 30), the company had 125 miles of its main line completed and in operation on June 15th, 1869—it having completed the fifth section of twenty-five miles on or before that date—and how much more it had in process of construction and nearing completion at that time the record does not show, but it must have been considerable in view of the fact that several additional sections of the main line were completed and put in operation soon after the date last mentioned. It had also acquired, prior to the adoption of the Constitution, and had in operation, that part of its Austin branch extending from the junction with the main line at Hempstead to the Town of Brenham, a distance of twenty-five miles, which was originally constructed by the Washington County Railroad Company and afterwards purchased by this company. In other words, much the greater part of the undertaking of the company by its acts of incorporation had been performed, and the public benefit sought to be accomplished by the legislation of the State in granting the lands to this company had been in a large measure secured, when the Constitution was adopted. This presents, therefore, a much stronger case thna appears in many other instances where rights of

this character have been sustained. Even the Supreme Court of Texas has, in times past, held that a public grant, when accepted by the expenditure of money, becomes an inviolable contract. In *Rio Grande R. Co. vs. Brownsville, 45 Tex., 88*, it was said (p. 96):

> " But, in addition to this defect in the bill, " it plainly appears from the statement of " facts that appellee had consented to the " use of its streets by appellant. This was " not denied. The ground upon which ap- " pellee relies is not that it had not given its " assent to the use of its streets by appel- " lant, but that it had subsequently with- " drawn and revoked such consent. There " is nothing in the statute authorizing the " authorities of the cities and towns, after " agreeing with railway companies as to the " point or points at which the latter may " construct their roads, to withdraw from or " annul such agreement at their option. " That they have agreed to let the company " make its own selection would not seem to " alter the case. If they may revoke such " consent, which, however, we are not called " upon to decide in this case, it should ap- " pear it was done, and notice of it given " the company before any action was had or " expenditure was made on the faith of the " consent or agreement. But nothing of the " kind is alleged in the petition, or has been

" shown by the evidence. On the contrary, " the inference to be drawn from the bill it- " self is that appellant must have desig- " nated and surveyed its line, and had, prob- " ably, commenced work within the city " limits before the repeal of the ordinance " authorizing it to make its road on any " street it might select, as shown by the " statement of facts. If so, the repeal of " the ordinance granting appellant the priv- " ilege of selecting and appropriating any of " the streets and alleys of the city it chose " was clearly inoperative and void."

We may quote also the language of this Court in *Red Rock vs. Henry, 106 U. S., 596*, where it is said (p. 604):

" There is another consideration which is " entitled, in our opinion, to some weight, " and that is that, before the Act of 1870 " was passed, the railroad company had " made considerable progress in performing " the conditions upon which the Town of " Red Rock had agreed to issue its bonds. " It had located its line of road according " to the proposition made by the town, and " had for more than two months been en- " gaged in constructing its road upon that " line. It is true it was under no binding " contract with the town to go on and com- " plete the line, but it had unmistakably " manifested its purpose to do so, and had

" expended and was expending large sums
" of money in an effort to comply with the
" conditions upon which the town had
" agreed to issue the bonds. If, under
" these circumstances, the Legislature had
" withdrawn the authority of the town to
" issue its bonds or had imposed new con-
" ditions upon the issue, it would have been
" an act of bad faith. If possible, we should
" give such a construction to the act of the
" Legislature as would relieve the State
" from such an imputation."

It has been contended by the State, and may be contended again, that the General Act of January 30th, 1854, was a mere bounty law, repealable at the pleasure of the Legislature. While this company is clearly entitled to the land in question under the Special Act of September 21st, 1866 (*post*, p. LVIII.), independently of the general Act of January 30th, 1854, it is also entitled to it under the latter act extended to it as it was by the special Act of January 23d, 1856, as we have seen. We submit that any suggestion that the general act was a bounty law repealable at the will of the Legislature is altogether without force. It presents a case altogether different from that of *Salt Co. vs. East Saginaw, 13 Wall., 373*, relied on by the State

upon this point. It was not decided even in that case that a State can, by the repeal of a bounty law, impair or destroy rights which had accrued before the repeal. A general act to promote the construction of railroads is not a mere bounty law. It discharges a duty which the State owes to its inhabitants; it imposes onerous obligations on the grantee; it secures valuable benefits to the grantor; indeed, it is a part of the duty of the State to have its inhabitants supplied with public highways, and in modern times with railroads. The duty is ordinarily performed through railroad corporations which are regarded and treated as quasi-public agencies. When the legislation in Texas was passed the State was without railroads and undeveloped. It had millions of acres of public lands with no present value and over which hostile tribes of Indians roamed. Railroads were the only means of developing these lands and attracting immigration to the State. No line of railroad extended to or near Austin, the capitol of the State, and the Austin branch of this company was the first, and for nearly ten years the only line of railway reaching that city. It was to encourage the construction of this line and other lines for the development of the

State in order to open up its lands to settlement and develop its resources that the grant in question was made. The building of the road was a most adequate consideration for the grant. That such grant, even so far as it depended upon general law, was not, when it had been accepted and largely earned by the construction of an important part of the line, a mere bounty law, repealable at the will of the Legislature, seems to be a proposition that ought not to require citation of authority. But the language of this Court in a recent case is so applicable that we will quote it. In *United States vs. Denver, etc., Ry. Co., 150 U. S., 1*, in speaking of a general Act of Congress, the Court said (p. 8):

> " The general nature and purpose of the
> " Act of 1875 were manifestly to pro-
> " mote the building of railroads through the
> " immense public domain remaining unset-
> " tled and undeveloped at the time of its
> " passage. It was not a mere bounty for
> " the benefit of the railroads that might ac-
> " cept its provisions, but was legislation
> " intended to promote the interests of the
> " government in opening to settlement and
> " in enhancing the value of those public
> " lands through or near which such rail-
> " roads might be constructed. To induce
> " the investment of capital in the construc-

" tion of railroads through the public do-
" main, Congress had previously granted
" special rights," etc.

And at page 14 the Court says:

" It is undoubtedly, as urged by the
" plaintiffs in error, the well-settled rule of
" this Court that public grants are con-
" strued strictly against the grantees,
" but they are not to be so construed
" as to defeat the intent of the Leg-
" islature, or to withhold what is given
" either expressly or by necessary or fair
" implication. In *Winona and St. Peter*
" *Railroad vs. Barney, 113 U. S., 618, 625,*
" Mr. Justice FIELD, speaking for the Court,
" thus states the rule upon this subject:
" 'The acts making the grants * * *
" are to receive such a construction as will
" carry out the intent of Congress, however
" difficult it might be to give full effect to
" the language used if the grants were by
" instruments of private conveyance. To
" ascertain that intent we must look to the
" condition of the country when the acts
" were passed, as well as to the purposes
" declared on their face, and read all parts
" of them together.

" Looking to the condition of the country
" and the purposes intended to be accom-
" plished by the act, this language of the
" Court furnishes the proper rule of con-
" struction of the Act of 1875. When an

" act, operating as a general law and man-
" ifesting clearly the intention of Congress
" to secure public advantages or to subserve
" the public interests and welfare by means
" of benefits more or less valuable, offers to
" individuals or to corporations as an induce-
" ment to undertake and accomplish great
" and expensive enterprises or works of a
" quasi-public character in or through an
" immense and undeveloped public do-
" main, such legislation stands upon a
" somewhat different footing from merely a
" private grant, and should receive at the
" hands of the Court a more liberal con-
" struction in favor of the purposes for which
" it was enacted (*Bradley vs. New York and*
" *New Haven Railroad, 21 Connecticut, 294;*
" *Pierce on Railroads, 491*)."

In view of the general branching privileges conferred upon the company by its original act of incorporation passed March 11th, 1848, the specific authority conferred upon the company by the Act of February 7th, 1853, to construct the Austin branch; the extension of the grant of sixteen sections of land per mile made by the general Act of January 30th, 1854, by the special Act of January 23d, 1856, to this company for the construction of its Austin line, as well as its main line, on condition that it should surrender its general branching privi-

leges; the extension from time to time granted the company by the special acts of the Legislature for the construction of its line, as required by the laws making the grants, and the preservation by such laws of the rights of the company; the extension granted by the general acts of January 11th, 1862, upon conditions specially imposed upon this company, all of which were fully complied with; the specific grant made by the special Act of September 21st, 1866; the extension of all the laws relating to the subject by the General Act of November 13th, 1866; the confirmation of the purchase of the Washington County Railroad by the Constitutional Convention of 1868, and the reiteration by said convention of the right to build to Austin, as well as the extension of time granted by that convention; the waiver of all grounds of forfeiture that may have theretofore existed by the special Act of August 15th, 1870, as well as the confirmation by that act also of the purchase of the Washington County Railroad and the reiteration again thereby of the right to build the line to Austin; the completion by the company of more than 125 miles of its main line, and the acquisition of a line constituting about 25 miles

of the Austin branch before the adoption of the Constitution of 1869; the issuance of the certificates as provided by said acts from time to time by the executive department charged with the enforcement of said acts and invested with the exclusive jurisdiction of determining the fact of construction as required thereby; the location of certificates and the survey of the lands by the State's officers; the filing of the field-notes regularly in the General Land Office; the platting of the surveys upon the maps, and the recognition of their validity upon the records of the State and by all departments of the State for twenty years; the annual collection by the State of the taxes assessed upon the lands as the property of the company; and in view of the contract and vested right acquired by the company by reason of these facts to the lands in question, which right is clearly within the protection of the Constitution of the United States, as settled by repeated decisions of this Court, the question naturally arises, how the State Courts could have reached the conclusion that the Constitution of 1869 was effective to impair and take away this right. With that inquiry we will next proceed.

IV.

The Texas Constitution of 1869, as construed by the State Court, impairs the company's contract right to the lands in question, and this result is not avoided by the assumption by that Court of a ground of decision or line of reasoning inconsistent with the provisions of the contract, as evidenced by the legislative acts and the ordinances of the Constitutional Convention.

As already suggested, there does not seem to be room to doubt that the Court of Civil Appeals bases its judgment substantially upon the broad ground that the Constitution of 1869 repealed the laws granting the company the lands in question; and this, although the company had constructed the greater part of its line before that Constitution was adopted and in reliance upon the land grants theretofore made it, and had thereby secured, as shown by the authorities cited under the preceding point, a contract and vested right to such lands. Such, undoubtedly, was meant by the Court in its reference to the

then recent decisions: *H. & T. C. Ry. Co., vs. State, 34 S. W. Rep., 734 (89 Tex., 294); Quinlan vs. H. & T. C. Ry. Co., 34 S. W. Rep., 738 (89 Tex., 356); and G. H. & S. A. Ry. Co. vs. State, 34 S. W. Rep., 746 (89 Tex., 340).* In the case last mentioned the Supreme Court distinctly held that the Constitution of 1869 repealed all laws then in force granting lands to encourage the construction of railroads; though in the Quinlan case it left open for determination, on a new trial which it ordered, the question whether such repeal had the effect to deprive the company of the lands granted to it if it should be shown on such trial that it had organized and commenced work and expended money in the enterprise before the adoption of the repealing Constitution. These cases were referred to as determining "many of the im-" portant questions of law involved" in this case, and this was, undoubtedly, one of the questions referred to, and which the Court of Civil Appeals understood had been determined in those cases. It was, in fact, the only question arising in this case which had been determined in those cases *adversely* to the company; and since the Court referred to them for reasons for the

affirmance of the judgment of the District Court against the appellants it would seem to follow it had specially in view this question. It is true that in the Quinlan case the Supreme Court held, contrary to the view of the District Court in this case, that the Act of November 13th, 1866, continuing the land-grant laws in force for ten years, was not void, but was in accordance with the Constitution of the State then in force. But, evidently, it was not upon this point that the case was cited, since, as said before, notwithstanding that point was ruled in favor of appellants by the Supreme Court, the Court of Civil Appeals affirmed the judgment in this case upon the only remaining ground—which was that the laws had been repealed by the Constitution of 1869. The other case (*H. & T. C. Ry. Co. vs. State, 89 Texas, 294*) simply held that the Receiver of the Federal Court, in whose custody the property was at the time that suit was brought, was not a necessary party, and that, notwithstanding the lands were in the custody of the Federal Court, the State Court had jurisdiction to entertain the suit involving the title. It was, therefore, cited by the Court of Civil Appeals against appellants on their

contention in this case that the Receiver was a necessary party and that the District Court was without jurisdiction. It seems entirely clear, therefore, that the object, and the only object, the Court of Civil Appeals had, or could have had, in citing the case mentioned as settling "many of the important questions of law involved" in this case was to indicate that it regarded them as settling—*first*, that the Receiver was not a necessary party, and that the State Court had jurisdiction notwithstanding the receivership; and, *second*, that the Constitution of 1869 repealed the laws granting lands to the Houston and Texas Central Railway Co., as well as all other land-grant laws then in force, since these were the only points involved in this case which were ruled against these appellants in the cases referred to.

The Court then proceeded to consider the additional or peculiar features of this case, and in so doing, after reciting the purchase of the Washington County Railroad, the passage of the Act of August 15th, 1870, and the extension of the road to Austin after the Constitution of 1869, the location of the certificates in the Texas and Pacific reservation, states as the questions to be

decided: "Were the certificates valid? If so, were the locations valid?" The last question it found unnecessary to decide. It referred to the Act of August 15th, 1870, as "the Act which "authorized the extension of the Washington "County Railroad from Brenham to Austin," and held that the Constitution of 1869 then stood in the way of whatever new power that act attempted to confer upon the company to acquire land by building the road to Austin. It then asks the further question: "Did the power to construct the Austin line exist independent of the Act of 1870?" It then practically conceded that such power did exist, and that, while the right to build the Austin line had been "retained" by the company, the right to acquire sixteen sections of land for every mile of such road was not; and obviously the only reason in the Court's mind why the right to the land granted had not been "retained" was because the Constitution of 1869 had taken it away. It is true that the Court, in this connection, refers to the fact that the general Act of January 30, 1854, denied to the company the land grant for branch roads. But in this it seems to have excluded from consideration the specific extension by the Act of January 23,

1856, to the Austin line, of the grant made by the general Act of January 30, 1854, as well as the indisputable grant for the Austin branch, as well as the main line made by the special Act of September 21, 1866. As already shown under the preceding point, the grant of sixteen sections per mile, made by the general Act of January 30, 1854, was made to apply to the Austin line of this company by the special Act of January 23, 1856, as effectually as if it had been expressly conferred by the general act and as if the provision denying lands to branch roads had not been incorporated in the general act. How was it in view of the Act of January 23, 1856, and of the Act of September 21, 1866, that the company "retained" the right given it by early laws to construct the Austin line and did not "retain" the lands granted by those laws for the construction of that line? The question admits of but one answer, and that is that, in view of the Court of Civil Appeals, the Constitution repealed those laws so far as they granted lands, but did not repeal them or other laws so far as they gave the right to construct the Austin line.

Can we be mistaken about this, and can it be

that the Court of Civil Appeals meant to hold and to base its judgment upon the sole ground that the company was not authorized to construct the line in question until the Act of August 15, 1870, was passed? We submit that its language admits of no such interpretation, but on the contrary clearly indicates that the ground of the ruling was as we have stated. The State Supreme Court evidently understood it as we do, for that Court does not write opinions in refusing applications for writ of error except where it places its decision upon grounds essentially differing from those given by the Court of Civil Appeals in their decision in the case. If the Supreme Court had understood that the Court of Civil Appeals based its judgment upon the ground that the company was not authorized by legislation in force when the Constitution of 1869 was adopted, or until the Act of August 15th, 1870, was passed to build the line in question, then there would have been no occasion for it to specify in a written opinion that it refused the writ of error upon that ground, because this would have been understood without it, and the Court, no doubt, would have adhered to the practice always fol-

lowed of refusing the writ of error without a written opinion where the reasons for such ruling were the same as those given by the Court of Civil Appeals in affirming the judgment. But the Supreme Court understanding, as we do, the Court of Civil Appeals as holding that the company was not entitled to the lands for the sole reason that the laws granting them had been repealed by the Constitution of 1869, it preferred to base its action in refusing a writ of error upon the ground that the company was without authority prior to the Act of August 15th, 1870, to build the line in question. It seems to us entirely clear, for these reasons, that the Court of Civil Appeals decided, and meant to be understood as deciding, that the company had the right, under the laws enacted prior to the Constitution of 1869, to build the line in question, but that the Constitution of 1869 repealed all laws then in force granting lands for the constructing of such line.

We shall now, however, for the sake of the argument, take the other view, and proceed upon the assumption that the Court of Civil Appeals based its judgment upon the same ground as that stated by the Supreme Court in its opinion

refusing the writ of error. The Supreme Court doubtless preferred to rest its judgment upon some ground, if any could be found, that apparently would not involve the holding that this company had acquired a right to the lands in question under laws passed prior to the Constitution of 1869. It could not hold, as the District Judge did, that the company had lost its right to the land grant in question by the failure to construct its road as rapidly as some of the acts, subsequently waived, had required. It realized, no doubt, that this inquiry was not open to the courts; that the executive department had been invested by the laws granting the lands with the exclusive jurisdiction of ascertaining the facts with respect to construction, and the time of construction; that such facts had been determined by the department invested with exclusive jurisdiction to determine them; that upon such determination the certificates had been issued, the lands surveyed and the certificates located, and that the road had been built and in operation a great many years before, and that there was then no legal evidence inconsistent with the facts found by the executive department. It also realized that if there had been

any failure with respect to the time of construction, and that a ground of forfeiture had on that account at one time existed, no proceedings to declare it had ever been taken, but the company had been permitted to build the road and earn the lands; and especially that default in such respects on the part of the company, and all ground for forfeiture on that account, if any ever existed, had been expressly waived by the Legislature. In order, therefore, to sustain the judgment, the Court was required to hold either that the Constitution of 1869 was effective to impair the contract between the company and the State, or that no such contract existed, and it took the latter view, while the Court of Civil Appeals had taken the former. But we have already seen (*ante*, pp. 58–61) that this Court has the right to inquire and determine for itself, independently of the views of the State Court, whether, as a matter of fact, any contract did exist. That there was such a contract has been, we think, fully demonstrated. Taking the unlimited branching privileges conferred upon the company by the original act of incorporation, approved March 11, 1848, the

specific authority to construct the Austin Branch conferred by the Special Act of February 7, 1853, the distinct reservation and recognition of the right to construct that branch in the Act of January 23, 1856, the extension by the latter act to the Austin branch of the grant made by the General Act of 1854, the indisputable grant to the Austin line, as well as the main line, made by the Act of September 21st, 1866, the purchase of the Washington County Railroad and the ratification and confirmation of such purchase by the ordinances of the Constitutional Convention, passed August 29th, 1868, and the Act of August 15th, 1870, and there is no room whatever to doubt that a clear, definite contract (so far as public grants and their acceptance and action upon them can constitute a contract) between this company and the State, for the lands in question, did exist. In order, therefore, to hold that this state of facts did not create a contract, it became necessary for the Court to ignore or eliminate some of those elements of the contract, and which it did by ignoring and treating as void the declaration of the Constitutional Convention recognizing and confirming the purchase of the Washington County Railroad, and

by assuming that the said railroad did not constitute a part of the lines of the Houston and Texas Central Railway Company at the time of the adoption of the Constitution of 1869. We might concede that the Court was right upon both of these points, and still its judgment was wrong, as we shall endeavor to show under a subsequent point in this argument. But if it was wrong upon either of these positions the inquiry need proceed no further; and we shall, therefore, consider those questions before proceeding to our contention that, without the ordinances of the Constitutional Convention and without legislative authority for the purchase of the Washington County Road prior to the adoption of the Constitution of 1869, nevertheless the company was entitled to the land grant for the line in question, since the Legislature, by the Act of August 15, 1870, confirmed and authorized, if it had not before been confirmed and authorized, the purchase of the Washington County road, and that such confirmation and authority related back to the time of the purchase and gave it validity from the first.

V.

The declaration of the Constitutional Convention of 1868 recognizing the purchase of the Washington County Railroad and making it a part of the Houston and Texas Central Railway and authorizing the extension of the line to Austin was valid.

The Supreme Court of Texas in Quinlan vs. the Houston and Texas Central Railway Company, 89 Tex., 356, held that the Convention assembled under the Acts of Congress, commonly known as the "Reconstruction Acts" (*14 Stats. at Large, pp. 428, 2, 14; 15 Stats. at Large, pp. 41, 85, 344; 16 Stats. at Large, p. 40*), was without any power to legislate or to do anything more than frame a Constitution to be submitted to a vote of the people, and that, therefore, the ordinances brought in question in that case, as well as all other ordinances passed by that convention, were mere nullities. The Court, therefore, in this case, ignored the ordinance or declaration of August 29th, 1868 (*post*, p. LXIII.), confirming and recognizing the valid-

ity of the purchase of the Washington County Railroad, and making it a part of the Houston and Texas Central Railway, and reiterating the authority to extend the branch to Austin.

Every convention that ever assembled in the State of Texas before or since exercised the powers that were exercised by the Convention of 1868 to pass ordinances, and in that way to legislate to a certain extent. It was supposed until the recent decision before referred to (invalidating a railroad land grant that had remained unquestioned for many years) that the validity of such proceedings was settled.

The convention which framed the Constitution adopted by the State upon its admission into the Union passed such ordinances, and one of these was considered by the Supreme Court in *Stewart vs. Crosby*, *15 Tex.*, *546*, decided in 1855 and held valid; but it appears from the opinion that the ordinance there drawn in question was submitted to the vote of the people with the Constitution.

The next convention was that of 1861, through which the secession of the State was attempted, and it, like the other conventions, passed many

ordinances of a legislative character, none of which were submitted to a vote of the people except the Ordinance of Secession. But all of these are, doubtless, void as having been in aid of the rebellion and in attempted derogation of the powers of the National Government. So the Convention of 1866, called to renounce the action of the Convention of 1861, and to re-adjust and restore the relations of the State with the Union, also passed many ordinances of a legislative character, none of which were submitted to a vote of the people, while the amendments to the Constitution passed by that convention were submitted to a vote and adopted.

The validity of the ordinances of this convention, although not submitted to a vote of the people, was recognized by the Supreme Court of the State in Ryan vs. Flint, 30 Tex., 382; McClelland vs. Slauter, Id., 497; Maloney vs. Roberts, 32 Tex., 139; Haddock vs. Cocheren, Id., 276, and Waters vs. Waters, 33 Tex., 50; and the validity of such an ordinance was expressly sustained by the State Supreme Court in *Grigsby vs. Peak, 57 Tex., 142.* The convention which framed the present Constitution of the State (known as the Constitution of 1876), like

its predecessors, passed ordinances of a legislative character, including an ordinance preserving from forfeiture the land grants theretofore made to railroad companies, none of which ordinances were submitted to a vote of the people, though one of them provided that the ordinances should not be valid unless the Constitution should be adopted by the people.

The convention which framed the Constitution of 1869 and passed the ordinance in question passed a great number of ordinances of a legislative character, creating new counties, granting charters, etc. No Legislature sat in the State between 1866 and 1870. During that period, or subsequent to the Reconstruction Acts of 1867, the State was subject to military government, and the Convention of 1868, called in pursuance of those acts, was the only body of that period of a legislative character. It was the only assembly of the people, the only body capable of expressing their will. It assembled under peculiar conditions, and the circumstances surrounding it were wholly dissimilar from those attending any other similar body, except, of course, the conventions held in other Southern States during the same period. It consisted of

the representatives of the people who were without other representation. Other conventions in other times were called by people who had other legislative machinery—that of the ordinary legislative body—to enact laws for them. Under ordinary circumstances the people can look to the regular legislative assemblies for the enactment of general legislation, and it may not be unreasonable, therefore, for a convention assembled under such circumstances for the purpose of framing a Constitution to be restricted to that work and required to leave general legislation to the regular legislative body. But here there was no Legislature—no other assembly of the people—to enact laws for them, and none was possible. The civil government of the State had been, in effect, abolished by the Reconstruction Acts and as a result of the war, and this convention was assembled as the representatives of the people to restore the State Government. While it may be true, as held by the State Supreme Court, that the power to legislate was not expressly conferred upon this convention by the Reconstruction Acts of Congress, it does not follow that they were without such power. Certainly the power was not forbidden, and, this

being so, it was, we submit, under the circumstances, inherent in the body, and, indeed, we think it is implied from the acts under which the convention assembled. The first act of the series—that of March 2d, 1867 (14 Stats. at Large, p. 428)—after dividing the Southern States into military districts, and providing for their government by military authorities, simply provided in Section 5 that the States should not be entitled to representation in Congress until they should have adopted the Constitution framed by a convention of delegates chosen by the class of voters specified therein, and had ratified the Fourteenth Amendment to the National Constitution. No provision was made by that act for the calling of such convention, though the next act of the series—that of March 23d, 1867 (14 Stats. at Large, p. 2)—provided for the registration of the voters and the election of the delegates under the supervision of the military authorities, and the convention was referred to in the act as "a convention for "the purpose of establishing a Constitution and "*Civil Government for such State*," etc.; and in Section 4 it was further provided that, upon notification of their election, the convention

should assemble, and, after organization, should " proceed to frame a Constitution and Civil Gov- " ernment," etc.

The Convention of Delegates elected in pursuance of these acts assembled at Austin June 1st, 1868, and adjourned August 31st, 1868; convened again on December 7th, 1868, and finally adjourned on the 6th of February, 1869. In pursuance of the Act of Congress, approved April 10th, 1869 (15 Stat. at Large, p. 84), the President submitted the Constitution framed by the convention to a vote of the people at an election held on the 30th day of November and the 1st, 2d and 3d days of December, 1869, when it was adopted; and it was accepted by Congress by an act approved March 30th, 1870 (16 Stats. at Large, p. 80). At the same election State, district and county officers named in the new Constitution and Representatives in Congress were chosen. The Legislature elected at said election assembled at Austin February 8th, 1870, and ratified the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, and elected Senators, and then adjourned February 24th, 1870. It appears, therefore, that the Legislature which rati-

fied the amendments to the Constitution and which elected the Senators who were admitted upon the adoption of the Constitution, had been elected, assembled and did these acts, and finally ad journed, before the Constitution was accepted by Congress, until which time it did not take effect.

The whole proceeding was anomalous. The power of Congress to declare an existing State government (feeble and imperfect though it might be) unlawful, and that, too, when the State was a member of the Union, and as held repeatedly by this Court never out of the Union, as well as the power of Congress to provide for the registration of voters of the State and to call an election of delegates for the purpose of framing a Constitution for the State, would ordinarily be disputed. Here, however, it was resorted to as a means demanded by the necessities of the case and as a result of the conditions growing out of the war. It was not a time for indulging in refinements respecting constitutional powers of the Legislative Assemblies, and when the restoration of civil government and the relations between the States of the Union was the controlling object. It would seem that the power of the Convention of 1868-9 to

pass the ordinances in question, and the other ordinances adopted by it, was about as clear as the power of Congress to pass the reconstruction acts. As already pointed out, there was no legislative body in the State—no assembly of the people to enact legislation—and none was possible under the circumstances. The convention was assembled, not merely for the purpose of framing a Constitution, but to ORGANIZE A CIVIL GOVERNMENT. Should rights which had been granted, and which the people of the State were willing to preserve, be lost because of the inability of the grantees to perform the conditions through no fault of their own, but wholly through the fault of the State? The people were without representation, and there was no other body than the Convention of 1868 to express the will of the people respecting such matters. The State was required by every suggestion of honesty and fairness to save this and other railway companies from the forfeiture of the grants made them upon conditions which they had been prevented from complying with by the State's own wrong in engaging in the rebellion. This, as well as many other questions dealt with by the convention, was a local matter in which the

people of the State alone were interested, and they could only express their will through the delegates assembled in this convention. The conditions were most peculiar, and no narrow view of the powers of the convention to deal with local matters should be taken, especially when they were along the line of justice and fairness and designed to relieve the innocent victims of the State's wrong from the effect of the State's own wrongful action. Again, the very first Legislature that assembled after the Constitution of 1869 was accepted by Congress reiterated the action taken by the convention in this instance by passing the Act of August 15th, 1870, for the relief of this company.

There is another consideration of prime importance in this connection. So far as the ordinances under consideration are material to the question now before the Court, they merely evidenced the consent of the State to the purchase of the Washington County Railroad and the making of it a part of the line which the company was authorized to own and maintain; and reiterated the previous authority to extend to Austin. It is shown by the ordinance as well as by the Act of August 15th, 1870, that the

State was willing to accept this, and regarded it as within the general objects for which the company was created and as a proper means of securing the then all-important object of a line of railroad connecting the capital city of the State with tide water and with the outer world. There was no other means or agency except the convention through which the State could express its consent to the transaction and thus hasten the accomplishment of an object so important to the public welfare. Under these circumstances we do insist that the ordinance was effective at least as an evidence of the consent of the State that one of its corporations might purchase the works of another. It may be true that, so far as the ordinance provided for the settlement and adjustment of the indebtedness of the company to the State, it was of a legislative character in a larger sense, but with the validity of that provision we are not now concerned, though we contend, upon the reasons herein suggested, that all the provisions of the ordinance were within the legitimate and necessary powers of the convention.

If we are correct in our contention that the ordinance in question was within the powers of

the convention, or is valid at least to the extent that it evidenced the consent of the State to the purchase of the Washington County Railroad and the making of it as a part of this company's Austin line, then, of course, the inquiry is at an end, since it would then appear that the company had 25 miles of its Austin line in operation before the Constitution of 1869 was adopted, and that the construction subsequently of the line from Brenham to Austin would, under the ordinance or the authority conferred by the previous acts, be merely the completion of the Austin Branch.

Before leaving this branch of the case we may observe that this Court had occasion to consider in *Pacific Railroad Company vs. McGuire, 20 Wall., 36*, an ordinance passed by the Convention of 1865 which framed the Constitution of Missouri, adopted at the close of the war, and proceeded upon the assumption that the ordinance was a law of the state, within the meaning of the Constitution, which denies to States the power to pass any law impairing the obligation of contracts, though it was held invalid as contravening that provision of the National Constitution. But it does not appear from the report of the case

whether the ordinance was submitted to a vote of the people, nor are we familiar with the circumstances under which the convention passing it was assembled.

VI.

Independently of the ordinances of the Constitutional Convention of 1868 the Washington County Railroad was lawfully a part of this company's Austin branch prior to the adoption of the Constitution of 1869, and the subsequent construction of the line now in question was merely the completion of that branch.

The controlling purpose of the legislation of Texas prior to the war, and the main object of the people, was to secure the construction of important trunk lines of railway across the State, especially lines extending from tide water on Buffalo Bayou and Galveston Bay to the northern border on Red River, such as the Houston and Texas Central, intersecting and connecting with other trunk lines extending from the northeastern boundary of the State westward through the northern part of the State to the Pacific Ocean, like the Memphis, El Paso and Pacific Railway—now the Texas and Pacific—and a line from tide water on Buffalo Bayou westward through the southern part of the State, like the

Buffalo Bayou, Brazos and Colorado Railway (now the Galveston, Harrisburg and San Antonio Railway, extending from Houston to El Paso), to a point of connection in the western part of the State with the through line to the Pacific Ocean. This was undoubtedly the great scheme of the State during that period with respect to railroads. While the State desired all the lines practicable, either long or short, its main object was the construction of the important trunk lines mentioned, as evidenced by the fact that the grant made by the general Act of January 30th, 1854, was limited to main and denied to branch lines, and did not extend to short roads. But the State was without a line of railroad to Austin, its capital, and in order to secure this an exception to the general rule denying aid to branch lines was made in favor of the Houston and Texas Central Railway Company, as we have seen, by the special Act of January 23d, 1856 (*post*, p. XXXI.), which extended to that company for its Austin branch the land made by the general Act of January 30th, 1854, for main lines only.

It is a part of the history of the State that, with the single exception of the Washington

County Railroad, there was, at the beginning of the war, no line of railroad in operation in the State, except such parts of the three trunk lines mentioned as had then been constructed—viz., the Houston and Texas Central Railway, from Buffalo Bayou towards the Red River, on the north as far as Millican, a distance of nearly one hundred miles; the Buffalo Bayou, Brazos and Colorado Railway, from Buffalo Bayou westward, in the southern part of the State, to Columbus, something near the same distance; and the Memphis, El Paso and Pacific, from the north-eastern part of the State, near navigation on the Red River in Louisiana, for some distance westward towards the Pacific Ocean. When the Washington County Railroad Company was incorporated, in 1856, for the construction of a line from Brenham to a connection with the main line of the Houston and Texas Central at Hempstead, the latter line was completed and in operation within ten miles of Hempstead, and was completed there early in 1858 (Record, 73). The Washington County Railroad was, therefore, the means of drawing the much-desired line from tide water that much nearer the capital of the State. It was along the very line that the

Houston and Texas Central Railway Company was authorized to follow towards Austin. The purchase, therefore, of the Washington County road, and the merging of it into the Houston and Texas Central, was a substantial step toward the accomplishment of one of the important objects of the State at that time—viz., the extension of a line to the capital of the State. It should be borne in mind, in considering legislation of that period, that the jealousy of corporate power developed in recent times did not then exist, and the limitations upon such powers with respect to the purchase of or consolidation with other lines were not recognized or applied with the same strictness then as in more recent times. While, of course, these circumstances could not change the law upon the subject, nevertheless it seems to us that it is not out of place to regard them in construing charters granted and powers conferred upon railroad corporations during that period. It is safe to say that the Legislatures incorporating this company and conferring upon it its various rights and powers did not doubt its power to purchase a line, such as the Washington County road, existing along the route the

company was authorized to occupy; but assumed, and no doubt intended to confer upon it, all the corporate powers necessary to the accomplishment of its general objects of completing the line specified, whether such objects were attained by the construction of the whole line or by the purchase of a short road along the route and making it a part of the line. Certainly it was not to the interest of the State to require this company, in the construction of its Austin branch, to parallel the Washington County Railroad, thereby earning, as it could by so doing, the grant of sixteen sections per mile for such parallel road, when there was no necessity for it, and when there had already been a similar grant made for the existing line. Had this been done the company would have acquired for the construction of that part of the line paralleling the Washington County road about 250,000 acres of land for work that would have been of no advantage to the State and that would have ruined the investment made in the Washington County road, and would have presented the folly of two lines closely paralleled for a distance of twenty-five miles when there was such great necessity for judicious expenditure in railroad construction

in order that the greatest possible part of the State could be benefited thereby.

It is not sufficient to say that this does not meet the question of corporate power. Ordinarily it might not; but, under the circumstances here existing, it meets and answers it fully. The State may not be benefited by the consolidation of two existing lines of railroad under the conditions of the present day, and, therefore, the consent of the State thereto is not to be presumed or inferred from uncertain grants in corporate charters. But the powers of this company are to be considered in the light of the conditions that existed when it was created, and when the legislation relating to it was enacted, and the general object and purpose of the State is to be kept in view. Here it was obviously to the advantage of the State that the Washington County Railroad should be merged into the Houston and Texas Central Railway; first, because the through line was thus brought twenty-five miles nearer in its course to the State capital; and, second, because the State thereby saved something like 250,000 acres of land, which would have been lost, as well as the destruction of the value of the Washington County Railroad, which

would have been followed by the construction of a parallel line from Hempstead to Austin via Brenham, which was the direct route. In such a case the power of the corporation ought not to be restricted by any narrow construction. Reading it in the light of the facts and circumstances at the time the transaction occurred, it is obviously to the interest of the public and the State that this power should be recognized, and the Court should adopt that construction that would result in great benefit rather than injury to the public as well as to the corporation.

We insist that, aside from any special powers conferred upon these corporations by the acts relating to them, under which authority to purchase the Washington County road may be, as we believe, justly claimed, the purchase was within the general scheme contemplated by the State in the charter of the company and in the legislation of the State during that period, and that it was in pursuance of and a long step toward the fulfillment of one of the important objects for which the company was created and the completion of its line of road promoted by the State. This, we submit, is apparent from the line of road the

company was authorized to construct and the desire of the State for a line to its capital, and was, therefore, within the implied powers of the company.

Let us now consider whether there existed in the charter of the company *express* power to purchase the Washington County road. The Act of March 11th, 1848, originally incorporating this company, in Section 1 invested the company "with capacity to make contracts, "* * * to grant and to receive, and, gen- "erally, to do and perform all such acts and "things as may be necessary or proper for or "incident to the fulfillment of its obligations," etc. (*post*, p. I.). Power in the same language was conferred upon the Washington County Railroad Company by Section 2 of the act incorporating it (*post*, p. XXXVII.). It was invested "with capacity in said corporate name "to make contracts, * * * to grant and "receive, and, generally, to do and perform all "such acts as may be necessary and proper for "or incident to the fulfillment of its obliga- "tions," etc., and the company was further authorized to borrow money, issue its bonds, etc. Section 9 of the special Act of February 14th,

1852, relating to the Houston and Texas Central Railway Company (*post*, p. XII.), and Section 12 of the act incorporating the Washington County Railroad Company (*post*, p. XLIV.), are in substantially, if not identically, the same language, and read as follows:

> " This company is hereby required at all " reasonable times and for a reasonable " compensation to draw over their road the " passengers, merchandise and cars of any " other railroad corporation which has been " or may hereafter be authorized by the " Legislature to enter with their railroad " and connect with the railroad of this " company, and if the respective com- " panies shall be unable to agree upon the " compensation aforesaid it shall be the " duty of the president of each company to se- " lect, each, one man as commissioner, and the " two commissioners so selected shall choose " a third, in case of disagreement, neither of " whom shall be a stockholder in either road " or interested therein, and they shall fix " the rates, which shall not be changed for " one year from the time of going into " effect; the said commissioner shall also " fix the stated periods at which the said " cars are to be drawn as aforesaid, having " reference to the convenience and interests " of said corporation and the public who " will be accommodated thereby; the right

" or power is specially conferred on this
" company to connect and contract with any
" railroad company chartered by this State
" for the performance of like transport, and
" in case of disagreement between said
" companies the same shall be referred and
" settled as aforesaid, to be binding for one
" year as aforesaid."

While the sections just quoted may not be sufficient as *express* authority for this company to purchase the Washington County road, they do evince an intention upon the part of the Legislature that, whether they might agree to consolidate or not, the companies should be compelled to afford the public the advantages of a continuous line, even though they preserved their separate organizations and corporate existence. It goes to show the desire of the Legislature for a practically continuous line at all events, and that the purchase of the Washington County Railroad was not in contravention of the objects of the legislation relating to the companies. The Washington County Railroad occupied the only practicable route for the Austin branch of the Houston and Texas Central, and is about the nearest point of the main line to Austin. From Houston to Hempstead the main line goes directly towards

Austin, and from Hempstead it makes a rather sharp turn northward. Looking to the location of the roads and considering that the purchase of the Washington County road was merely toward the accomplishment of the objects for which the company was created, and considering the powers that the companies had under their respective charters, we think the case comes fairly within the decision of this Court in *Branch vs. Jesup, 106 U. S., 468*, although in that case one of the corporations concerned had express authority by its charter to make the transaction in question. but the other was confessedly without such power. Still, the transaction was in furtherance of the objects sought by the acts creating the purchasing company, since the purchased line occupied a part of its route. Here we have not only the occupation of the route by the Washington County road, but also the controlling object of securing the line extending to the capital of the State, which was then without any railroad facilities whatever, and the purchase of the Washington County road was, as already said, a long step toward the accomplishment of that object.

Suppose the Houston and Texas Central Rail-

way Company had employed an individual or some corporation to construct, under contract, for it, that part of its Austin line extending from Hempstead to Brenham, and deliver it in a completed condition, no one would deny its right to do so or its ownership of the line. It is to be observed also that the State Courts in this case do not say, and we do not understand them to decide, that the purchase of the Washington County road was *ultra vires*. If such had been their view, doubtless they would have so stated. They put their decision rather upon the ground that the construction of the line from Brenham to Austin was a separate and independent enterprise authorized for the first time by the Act of August 15th, 1870, and while the Constitution of 1869 was in force. We do not understand this as necessarily holding in effect that the purchase was unauthorized, but they deal with it as a new enterprise, just as would have been the authority to construct a branch line to Fort Worth or to some other point. In other words, they say, in effect, that the particular line, or part of line, for which the grant was made, was a new and additional line, and, the Constitution being in force, no land grant could be claimed for it.

However that may be, undoubtedly this Court can and must determine for itself, as we have seen, whether the Washington County Railroad had been merged in and was a part of the Houston and Texas Central Railway when the Constitution of 1869 was adopted, in order to determine whether the company had the right to the lands in question prior to that Constitution by extending its branch to Austin.

There is another consideration of controlling importance in determining whether the purchase of the Washington County road came within the powers of the company or was embraced in the general objects for which it was created, and that is that the authorities of the State, and the very Governor over whose veto the Act of August 15th, 1870, was passed, appointed an engineer to inspect the line in question upon its completion, and on whose report showing such completion certificates for these lands were issued and located. No question was then raised by the Governor known to be hostile to the railroad land-grant policy of the State respecting the ownership of the Washington County Railroad and its lawful existence as a part of the Houston and Texas

Central Railway, and it has never since been in any manner questioned by the State or by its authorities unless it can be said to have been drawn in question in this case. The line contemplated by the charter of and the special acts relating to the company has been completed and in operation over twenty-five years, and all the benefits contemplated by the State have been abundantly realized. The line extends from Buffalo Bayou to the Red River on the northern border, and from a junction at Hempstead to the capitol at Austin. This is the line sought by the State in the legislation relating to this company, and that the obligations of the company have been substantially complied with there is no doubt. We only know that a short section of the line was once the Washington County Railroad by reference to ancient legislative proceedings. Upon completion of the road the State recognized the performance upon the part of the company of the contract and promptly issued the certificates. Its officers surveyed the land. It received the field-notes in its General Land Office as valid certificates, platted the land as belonging to the company upon its maps, and recognized the ownership of the company to the

fullest extent for more than twenty years. It levied taxes upon it as the property of the company from year to year; it authorized the company to mortgage the lands, to borrow money upon them, and thus encouraged honest investment of money in building the roads which the State so much needed. The mortgages have been foreclosed, the lands sold, and they are now held by an innocent purchaser. Under these circumstances it does seem that the powers of the corporation, with respect to the purchase of this road, should not be denied upon any technical reasons which all must concede were never considered as objections to the transaction at the time it occurred.

VII.

Conceding for the sake of the argument that the purchase of the Washington County Railroad was ultra vires and that the ordinances of the Constitutional Convention of 1868 confirming it were void, it is nevertheless true that it was ratified by the act passed August 15th, 1870, and thereby legalized from the beginning, and the transaction is therefore to be treated as if the Washington County Railroad were a part of the Houston and Texas Central when the Constitution of 1869 was adopted.

We shall now proceed upon the assumption, for the sake of the argument, that the purchase of the Washington County Railroad was unauthorized and that the ordinances of the Convention which framed the Constitution of 1869 were void. Looking then to the situation in the most favorable aspect to the State conceivable, and we find this. The company had completed prior to the adoption of the Constitution of 1869, and had then in operation, more than 125 miles of its main

line, and owned and had in operation by purchase 25 miles of its Austin branch. Although we may assume that this purchase was unauthorized, it was nevertheless an accomplished fact. The company was then proceeding diligently with the prosecution of its work. It was clearly entitled under the existing law (certainly by the Act of September 21st, 1866, if not by the Act of January 23d, 1856) to the grant of sixteen sections of land per mile for the construction of its Austin branch. It had been prevented, as was recognized by this Court in *Davis vs. Gray* (*16 Wall., 203*), by the wrong of the State in plunging into the war, from completing its road and securing the lands which had been granted to it. It was, we may further concede for the sake of the argument, then in default, but through the wrong of the State and not its own fault, in the matter of completing its line as expeditiously as the laws required. We may further assume, for the same purpose, that a ground of forfeiture existed in favor of the State by the failure of the company with respect to construction, although it is evident, by decisions of this Court in the case referred to, that the State by its own wrong was debarred from claiming

such forfeiture. *But whatever may have been the right of the State to declare such forfeiture it had not been exercised. No judicial proceeding had been, or ever was, taken for that purpose, nor had any act of the Legislature equivalent to a judgment of office found at common law been passed; and that one of these was necessary is too well settled by the decisions of this Court to admit of question* (*St. L., etc., R. Co. vs. McGee, 115 U. S., 469; Van Wyke vs. Kneavals, 106 U. S., 360; Bybee vs. Oregon, etc., R. Co., 139 U. S., 663*), and seems also to have been settled by a decision of the Supreme Court of Texas (*G., H. & S. A. Ry. Co. vs. State, 81 Tex., 572*). Nothing whatever was done by the State, by judicial proceedings, by legislative enactment, or otherwise, indicating an intention to enforce any ground of forfeiture that might have existed.

Taking the view then most favorable to the State, it appears that when the Constitution of 1869 was adopted the company was diligently engaged in the prosecution of the work which had been interrupted by the wrongful conduct of the State in engaging in the war; that the company had failed to complete its road as rapidly as required by prior laws and was in default in

that respect since the ordinance of the convention of 1868 giving it further time were, we will assume, void; but that no action had ever been taken by the State to enforce any ground of forfeiture. It will scarcely be contended by anyone, except the District Judge who tried this case, that the company had then lost its right in the land granted, without any action of the State to enforce the forfeiture. It held the grant (still assuming the view for the State) as it had always held it, but subject to the power of the State, if it should deem proper, to enforce a forfeiture for default in construction, but in reliance upon the good faith of the State to voluntarily relieve it of the grounds of forfeiture, which the State by its own wrongful action had brought about. No forfeiture of lands granted to railroad companies for failure to construct their lines as rapidly as the law required, or otherwise than for failure to alienate (Sec. 7, Art. X.), was attempted in the Constitution of 1869. On the contrary, we have seen that the convention which framed that Constitution attempted to waive such grounds so far as this company is concerned, and a reference to its proceedings will show that it attempted to waive them as to other compa-

nies. Under these circumstances it will scarcely be contended, we apprehend, that the Constitution worked a forfeiture upon such grants, though it is contended that it stopped the earning of lands thereafter by repealing all laws granting them.

It would seem to follow from this situation, as a matter of course, that upon the adoption of the Constitution of 1869 this company still held its right to the land grant, subject to the assumed power of the State to forfeit the same for a failure to construct the line, unless, of course, the Constitution had the power to take away the right, not by forfeiture, for it did not attempt that, but by repealing the laws granting the lands. The Legislature had the same power after the adoption of the Constitution of 1869 that it had before to waive any ground of forfeiture that may have existed against the company for failure to construct the line. There was nothing in the Constitution limiting the power of the Legislature in that respect. To illustrate the matter more clearly, let us leave out of view for the present the Austin branch, and look to the main line of the company, and assume that the company was in default in the construction

thereof when the Constitution was adopted. Who will deny that the Legislature had power, after the Constitution was adopted, as well as before, to waive the ground of forfeiture and allow the company to acquire lands by completing its road under an extension of time given for that purpose, unless, of course, the Constitution repealed the laws granting the lands?

And then, again, what was there in the Constitution of 1869 to deprive the Legislature of the power to ratify the purchase of the Washington County Railroad, and make it as much a part of the Houston and Texas Central as any other section of the company's line?

It was, according to the State's own contention (and upon the assumption that the purchase was *ultra vires* and that the ordinance confirming it was void), just this situation that existed when the Act of August 15th, 1870, was passed. That act, as heretofore stated, recited in the preamble the purchase of the Washington County Railroad, and the desire for its immediate extension to the City of Austin, and provided in Section 1 as follows:

> "That the Washington County Railroad
> "is hereby made and declared to be to all

" intents and purposes in law a part of the
" Houston and Texas Central Railway, and
" shall be under the control and manage-
" ment of the Houston and Texas Central
" Railway Company in like manner as
" every other part of said railway; and the
" Houston and Texas Central Railway
" Company shall have the right to build
" and extend the part of its railway here-
" tofore known as the Washington County
" Railroad from the Town of Brenham, in the
" County of Washington, to the City of
" Austin, in the County of Travis, by the
" most eligible route to be selected by the
" engineers of the Company; and the said
" company shall also have the right to
" build a branch road diverging from the
" main trunk at some point in Navarro
" County and striking Red River at such
" point as will enable said railway com-
" pany to make a connection with any rail-
" road which may be built to the said
" River from the northward; and the said
" Houston and Texas Central Railway Com-
" pany by reason of the construction of said
" railway from the Town of Brenham to the
" City of Austin, and by reason of the con-
" struction of said branch from Navarro
" County to Red River, shall have and
" enjoy all the rights, privileges, grants
" and benefits that are now or may at any
" time hereafter be secured to any railroad
" company in the State of Texas by any

" general law of the State, and shall be sub-
" ject in respect to said railway and said
" branch to all the duties and responsibil-
" ities imposed upon said Houston and Texas
" Central Railway Company by its charter
" and by other laws of the State."

Section 4 reads as follows:

" No forfeiture of any of the rights or
" privileges secured to it by existing laws
" shall be enforced against the Houston and
" Texas Central Railway Company by
" reason of its failure to comply with the
" conditions as to construction imposed by
" the first section of the Act of the 21st of
" September, A. D. 1866, entitled 'An Act
" granting lands to the Houston and Texas
" 'Central Railway Company'; but the said
" company shall have and enjoy all the
" rights and privileges secured to it by ex-
" isting laws the same as if the conditions
" imposed in the first section of the said
" Act of the 21st of September, A. D. 1866,
" had been in all respects complied with;
" provided that the land grant to the said
" company shall cease unless the said com-
" pany shall complete their main trunk east
" of the Brazos River to Richland Creek in
" Navarro County within twelve months
" from the first day of October, A. D. 1870, and
" shall also complete their road to the City
" of Austin within two years after the pas-
" sage of this act."

The company, as found by the trial Court (Record, p. 30), completed its road to Richland Creek September 26th, 1871, and to Austin December 25th, 1871.

It appears, therefore, that whatever ground of forfeiture may have existed by reason of the failure of the company to construct its line as rapidly as theretofore required was distinctly and broadly waived by this act. It is always to be borne in mind that no such forfeiture had been declared; that the requirements with respect to construction were merely a condition subsequent, as held by this Court in *Davis vs. Gray*, *supra*, and many other cases, and that the title remained in the company in the absence of proceedings to enforce such forfeiture. It had not been enforced or declared by any provisions of the Constitution of 1869 or by other act of the State, and there was nothing whatever in that Constitution to deprive the Legislature of its power to waive it. That the Legislature under such circumstances had power to waive the ground of forfeiture is a proposition too well settled to admit of extended discussion in this Court.

Let us now consider the effect that this act had upon the purchase of the Washington

County Railroad and the extension of the Austin branch. If the Washington County road was lawfully a part of the Houston and Texas Central Railway when the Constitution of 1869 was adopted, it is evident that it was a part of the Austin branch with the same effect as if it had been constructed by the company, and that a subsequent completion to Austin was just as though the entire branch had been constructed by the company under the Acts of 1848 and 1853, giving it the right to construct the same. If it was not a part of the line in 1868, it was only because its purchase was unauthorized by the State.

Its purchase, its control and operation by this company, and its existence as a part of the company's Austin branch, were existing *facts*. Being such in fact, only the consent of the Legislature was required to make it in *law* a part of the Austin branch of this company. That consent was given broadly and without reservation by the Act of August 15th, 1870. This evidenced the consent of the State to the transaction and put its validity beyond any sort of question. Any issue respecting the power of the company to purchase the road was thereby rendered im-

possible. The State having expressed its consent by that act it was forever after debarred from denying the validity of the transaction which it expressly recognized and ratified.

That the subsequent ratification of an *ultra vires* or unauthorized contract of a corporation gives it validity and force *ab initio* is a proposition settled by a great number of authorities. The law is stated by Mr. Morawetz in his work on Private Corporations (Vol. 2, Sec. 651) as follows:

> "It has frequently been held that the "validity of a contract made by a corporation in excess of its charter powers may "be cured by a subsequent act of the Legislature. By such subsequent act the "contract is made as valid as if it had been "originally authorized. This shows that "the want of legislative authority to enter "into a contract in a corporate capacity "affects the remedy merely and not the existence of the contract itself; for the Legislature would have no power to create a "contract between the parties where there "was none before."

And he cites a great number of authorities and decisions in support of the statement. In speaking of the ratification of unauthorized acts

affecting the organization or existence of a corporation he says (Vol. 1, Sec. 20):

> " Such subsequent ratification will not
> " only legalize the existence of a corpora-
> " tion formed without authority of law and
> " authorize the association to act in a cor-
> " porate capacity thereafter, but it may also
> " cure the illegality of corporate acts per-
> " formed before the act of ratification was
> " passed and render such acts as valid and
> " binding as if authority to perform them
> " had been previously granted by the Leg-
> " islature."

In *Comanche County vs. Lewis* (*133 U. S., 198*) this Court said:

> " It is universally affirmed that when a
> " Legislature has full power to create cor-
> " porations, its act recognizing as valid a *de*
> " *facto* corporation, whether private or mu-
> " nicipal, operates to cure all defects in steps
> " leading up to the organization, and makes
> " a *de jure* out of what before was only a *de*
> " *facto* corporation."

And in *Whitewater Valley Canal Co. vs. Vallette* (*21 Howard, 414*) this Court said (p. 425):

> " If the rights of the appellees depended
> " upon the act of incorporation alone it would
> " be difficult to resist them. But in Janu-
> " ary, 1845, the Legislature of Indiana

" passed an act that recites the corporation
" had entered into a contract with Vallette
" to complete the canal, and was to be paid
" in their bonds drawing the legal interest
" in New York, and doubts were entertained
" as to the legality of the issue of these
" bonds; and thereupon it was enacted that
" all the bonds which might be issued in
" accordance with the contract existing be-
" tween the company and Vallette were
" *legalized.* A large portion of the work
" specified in the contract was performed
" after this enactment and the settlement
" under which these bonds were issued took
" place subsequently. *This act implies that*
" *there was no illegality in the fact that bonds*
" *were employed as a medium of payment for*
" *supplies of materials for, or work and*
" *labor done upon, the canal.*"

So in the present case after the passage of the act recognizing the Washington County road as a part of the company's Austin branch and removing all doubts on that score the line was completed to Austin within the time required by the act, the certificates were issued by the State, the lands were located and for a great number of years were held by the company or its vendee without question. Does not this *imply*, as the act considered in the case from which we have

just quoted it, that there was no illegality in the purchase of the Washington County Railroad.

Then, again, in *Galveston Railroad vs. Cowdery* (*11 Wall., 459*), in speaking of a mortgage executed by a railroad in Texas at a time when there was no statute of that State expressly authorizing railroad companies to mortgage their roads and franchises, this Court observed (p. 474):

"Without examining how far the operat-
"ive effect of a mortgage executed by a
"railroad company upon its road, works
"and franchises may extend, *per se*, with-
"out statutory aid, it is sufficient to say that
"in our opinion the Legislature of Texas has
"validated the mortgages and given them the
"effect which by their terms they were in-
"tended to have," and the Court held the mortgages valid and accordingly foreclosed them, when, as it now seems, the contract was clearly *ultra vires* when made.

In *Campbell vs. City of Kenosha, 5 Wall., 194*, it was held that where the Legislature of a State passes two acts, one authorizing a city to subscribe a limited amount of stock to a railroad, another authorizing it to subscribe an unlimited amount (which latter by

the Constitution it had no power to pass), and the city, professing to act under the one which authorized the unlimited amount, subscribes the limited amount, a subsequent recognition by the Legislature of the subscription as legal validates the subscription, and also that such legislative recognition might be made by implication (see, also, the *Clinton Bridge Case, 10 Wall., 454*).

That the subsequent ratification by the Legislature of a contract of a corporation in excess of its powers at the time made legalizes the contract from the beginning is a proposition which seems to be too well settled to require any extended discussion, and we shall, therefore, merely refer, without discussing them, to the following cases which support the proposition generally.

Shaw vs. Norfolk, etc., R. Co., 5 Gray (Mass.), 162.
I. G. T. R. Co. vs. Cook, 29 Ills., 237.
McAuley vs. C. C. & I. C. R. Co., 83 Ills., 348.
Bridgeport vs. Hoosatonic R. Co., 15 Conn., 475.
Bishop vs. Brainerd, 28 Conn., 289.
Meade vs. N. Y., H. & N. R. Co., 45 Conn., 199.
Shields vs. Clifton Hill Land Co., 94 Tenn., 123.
State vs. Webb., 20 So. Rep. Ala., 462.

The Court of Civil Appeals and the Supreme Court of Texas proceeded, apparently, upon the theory that because the Constitution of 1869 was in force when the Act of August 15th, 1870, was passed, the Company can claim nothing with respect to its land by virtue of the act. If the act made a *new and distinct grant of lands* and to which the company had no *previous* right a different question would be presented. But the company does not rely upon that act as *granting* it the lands. It is true that the act provided that the company should have the benefits conferred by future laws of the State, etc., but we are not concerned with that feature of it now.

Nor are we concerned with the question as to the power of the Legislature, after the adoption of the Constitution of 1869, to restore to a railroad company, theretofore incorporated and earning lands, any lands that may have been *forfeited* before the adoption of that Constitution. It is not claimed that this company had *forfeited* its right to the land grant. The most that can be claimed, or that is claimed, as we understand, upon that point, is that a *ground* of forfeiture had accrued from the de-

fault of the company in completing its road as rapidly as the law required, which default was due to the wrongful action of the State in engaging in the war. But, while such *ground* may have existed, the State had in no manner *enforced* the forfeiture. The result is, therefore, that the right to the grant remained in the company after the Constitution of 1869 was adopted, just as it was before, and subject merely to a possible ground of forfeiture to enforce which no steps were ever taken by the State and which the Legislature had the undoubted power to waive, and which it expressly waived, by the Act of August 15th, 1870. It is obvious, therefore, that this Act was not a *restoration* or regrant to the company of any right to lands which it had *lost* through failure on account of the wrong of the State, in complying with the conditions subsequent annexed to the grant, but was simply a *waiver* of such condition. It follows from this that unless the Constitution of 1869 was effectual to repeal the laws granting the lands to the company (a proposition already discussed) the company had the same right as it had before with respect to its lands.

What were those rights? They embraced the right of extending its main line to Red River and its branch line to the City of Austin and to receive a grant of 16 sections of land per mile for the roads thus completed. The Court of Civil Appeals concedes, and the Supreme Court does not deny, that the company retained, notwithstanding the Constitution of 1869, the right conferred, as heretofore shown, by prior laws to extend its branch to the City of Austin. But the former Court holds in effect, as we have seen, that the land grant was taken away by that Constitution while the Supreme Court held that the right to construct the road *from Brenham to Austin* was a new enterprise conferred for the first time by the Act passed August 15th, 1870—an error which we think we have already demonstrated. The company having, therefore, under the laws passed prior to 1869, the right to extend the line to Austin and receive lands therefor, had purchased 25 miles of existing road extending from its main line toward Austin, and was operating and treating it as a part of its Austin branch. It was such in fact, if not in law. If it was not such in law it was only for lack of legislative consent. This consent, as

we have seen, was expressly conferred by the Act of August 15th, 1870, whereby the purchase was confirmed and made as valid as if it had been previously authorized. The act operated upon the contract of purchase from the time the contract was made and settles forever any question respecting the power of the company to enter into it. We insist, therefore, that the Washington County road was in fact a part of the Austin branch of this company when the Constitution was adopted, and the State, by the Act of August 15th, 1870, concluded all inquiry into the legality of that fact, and thereby made the Washington County road a part of the Austin branch from the date of its purchase, with the right in the company by reason of the laws passed prior to 1869 to complete the same to the City of Austin as the branch it was by said laws authorized to construct, and for which it was entitled to the land grant.

This did not enlarge the grant theretofore made to the company by a single acre. In fact, as already pointed out, it diminished that grant to the extent of about 250,000 acres which were saved to the State, since the company could have paralleled the

Washington County road with its Austin branch and earned, not only every acre of land in question, but 16 sections per mile besides for 25 miles paralleling the Washington County road. The line from Brenham to Austin was not, as held by the Supreme Court, any *separate* and *distinct* line from that which the company had been previously authorized to construct. It was obviously the Austin branch of the company to the same extent as if it had also paralleled the Washington County road from Brenham to Hempstead.

Let us repeat, as it is of controlling importance and should be borne in mind throughout, that the Act of August 15th, 1870, did not *restore* to the company any land grant which it had *forfeited*, but only *waived* the possible *ground* of forfeiture which might have been defeated by the company by setting up the wrong of the State which caused it; that it did not authorize the company to construct any *additional* line of railroad or any line which it had not been previously authorized to construct; that it did not *add* a single acre to the grant of the company, but *diminished* the grant, and thereby saved to the State many thousand acres

of land; and that, since it did not *grant* any lands, it did not contravene any provision of the Constitution then in force; that it merely waived a possible ground of forfeiture which the Legislature, beyond any sort of question, had the right to waive; and expressed the consent of the State to the prior purchase of the Washington County road, thereby recognizing a *fact* previously existing—to wit, that the company had acquired the Washington County road, thereby securing an extension of its Austin line from the point of junction at Hempstead to Brenham, a distance of 25 miles on a direct line toward Austin.

That such was the only effect of the Act of August 15th, 1870, so far as it is material in this case, is a proposition so plain that we are left to wonder how the Courts below could have found anything in it contravening the Constitution of the State.

In conclusion, therefore, we submit as clear (1) that the company had the right to extend the branch to the City of Austin under the laws passed prior to 1869; (2) that there was made to it, for such line, a grant of 16 sections per mile thereof by the special Act of January 23d, 1856,

which extended to such branch line the grant made by the General Act of January 30th, 1854; or if not by this act, then undoubtedly by the special Act of September 21st, 1866; (3) that by the acceptance of its charter and these grants, and by the completion of an important part of its line before the adoption of the Constitution of 1869, the company had acquired a contract and vested right to the land grant which could not be impaired or taken away by that Constitution; (4) that whatever default the company was in with respect to the construction of its line when the Constitution of 1869 was adopted was the result of the State's own wrong in engaging in the war; (5) that all default with respect to the construction from whatever cause, and all grounds that may have existed, if any, for forfeiture, was waived (as previous defaults had been theretofore waived) by the Act of August 15th, 1870; (6) that the company, prior to the adoption of the Constitution of 1869, had purchased the Washington County road and had it in operation as a part of its Austin branch when that Constitution was adopted; (7) that such purchase was within the general purview of the objects of the State in creating the company and

the laws relating to it, and was, therefore, authorized, but that all doubts, if any, on this point were removed by the ordinance of August 29th, 1868, passed by the convention which framed the Constitution; (8) that, even if it be true that the purchase of the Washington County road was not authorized when made, and that the ordinance of the Constitutional Convention ratifying it was void, nevertheless it was ratified by the Act of August 15th, 1870, and thereby validated *ab initio*, and all questions respecting the original validity of the transaction were forever concluded; (9) that since the Act of August 15th, 1870, did not *enlarge* the grant theretofore existing, but on the contrary *diminished* the grant to which the company was entitled, after as well as before the adoption of the Constitution of 1869, and merely ratified the purchase of the Washington County road and the making of it a part of the Austin branch, which was a previous existing fact, and waived any supposed grounds of forfeiture, it was impossible for said act to have contravened the provision of the Constitution which denied the Legislature the power to grant lands in aid of railroads or any other provision of the Constitution; (10) that

the opinion of the Supreme Court that the lines for which the lands in question were granted was a *new and distinct* enterprise, and that, therefore, there was no contract to be impaired, was erroneous; (11) that the decision of the Court of Civil Appeals, as well as the effect of the opinion of the Supreme Court of Texas, is that the Constitution of 1869 was effectual to impair the contract right of the company to the lands in question, and (12) therefore, said Constitution in such respect is in contravention of the Constitution of the United States, especially Sec. 1, Art. 10, which denies to the States power to pass any law impairing the obligation of contracts, and Sec. 1 of Art. XIV. of the amendments, which denies to the States power to deprive any person of property without due process of law.

VIII.

The judgment of the Court of Appeals should be reversed and judgment should be directed to be entered in favor of the plaintiffs in error.

JAMES A. BAKER,
R. S. LOVETT,
Of Counsel for Plaintiffs in Error

APPENDIX.

An Act to establish the Galveston and Red River Railway Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that a body politic and corporate be, and the same is hereby, created and established, under the name and style of the "Galveston and Red River Railway Company," with capacity to make contracts, to have succession and a common seal, to make by-laws for its government, and in its said corporate name to sue and be sued, to grant and to receive, and generally to do and perform all such acts and things as may be necessary or proper for, or incident to, the fulfillment of its obligations, or the maintenance of its rights under this act, and consistent with the provisions of the Constitution of this State.

SEC. 2. That the said company be, and hereby is, invested with the right of making, owning and maintaining a railway from such point on Galveston Bay, or its contiguous waters, to such point upon Red River, between the eastern boundary line of Texas and Coffee's Station, as the said company may deem most suitable, with the

privilege of making, owning and maintaining such branches to the railway as they may deem expedient.

SEC. 3. That Ebenezer Allen, and such other persons as he may associate with him for the purpose, are hereby appointed commissioners and invested with the right and privilege of forming and organizing the said company, of obtaining subscriptions to the capital stock, and distributing the shares thereof; and generally of taking such lawful measures to secure the effectual organization and successful operation of said company as they may deem expedient.

SEC. 4. That the capital stock of said company shall be divided into shares of one hundred dollars each, and the holders of such shares shall constitute the said company, and each member shall be entitled to one vote in person or by proxy for each and every share he may own, and such shares of stock shall be transferable alone upon the books of the company, which books shall be kept open for the inspection of any stockholder who may wish to examine them at the office of the company in proper business hours.

SEC. 5. That the affairs and business of the said company shall be conducted and managed

by a Board of Directors, not to exceed nine in number, who shall be elected by the company, at such time as the said commissioners may appoint, and annually thereafter; *provided* that, in case of failure so to elect at the stated time, the Board of Directors incumbent shall continue in office until there be an election, the time for which may be fixed by said board, whereof reasonable notice shall be given.

SEC. 6. That no person shall be eligible as a director unless he be the owner of at least five shares of the capital stock. The said board shall elect a president from their number, to fill vacancies occurring from death, resignation or otherwise; have power to appoint a secretary and such other officers as they may consider necessary, and to require security for the faithful performance of their duties; also to prescribe the time for the payment of installments or assessments upon the stock and the amount of such installments or assessments; to declare the forfeiture of such stock for nonpayment; and to do or cause to be done all other lawful acts or things which they may deem necessary or proper in conducting the business of said company. A majority of said Board of Directors

shall constitute a quorum for doing business. All instruments in writing executed by the president and secretary under the seal of the company, with the consent of the Board of Directors, shall be valid and binding.

SEC. 7. That the said company shall be empowered to occupy such portions of the public lands, not exceeding one hundred yards in width, as the said railway or any of its branches, to be constructed in accordance with this act, shall pass through, and to take from the public lands contiguous thereto such metals, timber and other materials as may be useful or necessary in the construction and maintenance of their works and the prosecution of their operations or business, the company paying a reasonable compensation to the State for the said privilege.

SEC. 8. That if the said company shall not commence its operations within two years from the first day of June, 1848, and shall not have completed at least one hundred miles of the said railway within five years thereafter, then, and in such case, the rights, powers and privileges herein granted to the said company, for the construction of said railway, shall cease and be determined.

SEC. 9. That the said company shall have the right of constructing bridges and other improvements upon and over any watercourse bordering upon or crossing the said railway or any of its branches; *provided*, that the navigation of such watercourse shall not be obstructed thereby.

SEC. 10. That if any person shall negligently or designedly injure or destroy any of the fixtures, buildings, machines or improvements of the company, or any portion of the said railway or its branches, he shall be subject to indictment therefor, and on conviction may be punished by fine and imprisonment, and shall be also liable to the said company in a civil action for damages.

SEC. 11. That no provision contained in this act shall be so construed as to grant or allow any banking privileges, or any privilege of issuing any species of paper to circulate as money to the aforesaid company.

SEC. 12. That the said company shall have the right to charge five cents per mile for passengers and no more, and shall have the right to charge not exceeding fifty cents on the hundred pounds for freight for every hundred miles that the same may be transported on said railway;

provided, however, that the Legislature of the State of Texas shall have the right to fix and regulate the price that said company shall charge for carrying the public mails of the United States.

Approved March 11, 1848.

(The above act is published as Chapter 204 of the special laws passed by the Second Legislature of Texas, pp. 370–373).

An Act Supplementary to the Act to Establish the Galveston and Red River Railway Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that all that portion of the act to establish the Galveston and Red River Railway Company, approved the 11th of March, 1848, contained in the 4th Section, and all the subsequent sections thereof, be, and the same are hereby, repealed; and, whereas, it is desirable to preserve uniformity in the several acts establishing railway companies passed by this Legislature, the following provisions are hereby adopted at the instance of the Commissioners

named in the said original act for the government, formation and observance ot the company thereby established.

SEC. 2. That the meetings of the Commissioners provided for by this act and the said original act, may be held at such times and places as they may appoint, and at said meetings the Commissioners may act in person or by proxy.

SEC. 3. The capital stock of said company, to consist of all its property, real and personal, franchises and rights to property, shall be divided into shares of one hundred dollars each, each share entitling the owner thereof to one vote by himself, or by proxy, at all meetings of said company; that said shares shall be deemed personal estate, and shall be transferable by any conveyance in writing, recorded by the treasurer in books kept by him at his office, or in such other manner as the by-laws of said company shall provide.

SEC. 4. The immediate government and direction of the affairs of said company shall be vested in a board of not less than six directors, who shall elect one of their own number as president of said company; no

person shall be eligible to the office of director unless an owner or subscriber of at least five shares of the stock of said company. The directors shall have the power to fill any vacancy that may occur in said board from non-election, death or otherwise, and may appoint a secretary, treasurer and such other officers and agents as they may consider necessary, and prescribe and require bonds for the faithful performance of their duties. They may, if not otherwise provided by the by-laws, determine the manner of conducting all meetings, the number of members that shall constitute a quorum, and to do, or cause to be done, all other lawful matters and things which they may deem necessary and proper in conducting the matters of the company. They shall keep, or cause to be kept, accurate records of all meetings of the directors and company and accurate books of accounts of the receipts and expenditures of the company, and all other books necessary and proper to be kept by such company, which shall be open to the inspection of the stockholders. A majority of the Board of Directors shall have the authority of a full board, and all conveyances and contracts in writing, executed by the president and countersigned by the secretary, or

any other officer or person authorized by the directors under the seal of the company, and in pursuance of a vote of said directors, shall be valid and binding.

SEC. 5. The shares may be disposed of and books open for subscription thereto in such manner and on such terms as said Commissioners shall determine will be best for the interest of said company, and any agreement in writing by which any person shall become a subscriber to the capital stock of said company may be enforced against him according to its terms; and, if any subscriber shall fail to pay any amount due upon shares subscribed by him according to the terms of his subscription, the directors may sell at auction and transfer to the purchaser the shares of such delinquent, and if the proceeds of sale shall not be sufficient to pay the amount due on said subscription, with interest and charges, such delinquent shall be held liable to the company for the deficiency, and if the proceeds shall exceed the amount so due, with interest and charges, said delinquent shall be entitled to the surplus.

SEC 6. It shall be lawful for the company to enter upon and purchase or otherwise take and

hold any land necessary for the purpose of establishing and constructing said railway, with all necessary depots and other buildings; and, if they shall not be able to obtain said lands by agreement with the owner thereof, they shall pay therefor such compensation as shall be determined in the manner provided by the following section; *provided*, that the land so taken for the roadbed shall not exceed two hundred feet in width, and for depots and other buildings only such further width as shall be needed for such purposes.

SEC. 7. Any person, when land has been taken as aforesaid without agreement or satisfactory compensation, may apply to the District Court of the county in which said land is situated, for the appointment of, and the Court shall thereupon appoint, three disinterested freeholders of the county, who shall appoint a time and place to hear the applicant and the company, to whom shall be given by said freeholders reasonable notice of said time and place; and said freeholders shall, after being sworn, and after due hearing of the parties, determine the amount of compensation, if any, to which the applicant may be entitled, and make return of their award to

the next succeeding term of said Court; and said award, if not rejected by said Court for sufficient cause then shown, shall be entered up as the judgment of said Court. In determining the question of compensation, said freeholders shall be governed by the actual value of the land at the time it was taken, taking into consideration the benefit or injury done to the other lands and property of the owner by the establishment of said railway; and, if the amount of compensation awarded by said freeholders shall not exceed the amount offered by said company to the owner prior to said application to the Court, the applicant shall pay the costs of the proceedings; otherwise, the company shall pay the same.

SEC. 8. It shall be the duty of said company, whenever any State or county road now by law established shall be crossed by the track of said railway, to make and keep in repair good and sufficient causeways at such crossings; and in all cases where any person shall own lands on both sides of said railway, and there shall be no other convenient access from one part to the other, such owner shall have the right of passage free of cost at all reasonable times across the track of said railway.

Sec. 9. This company is hereby required at all reasonable times and for a reasonable compensation to draw over their road the passengers, merchandise and cars of any other railroad corporation which has been, or may hereafter be, authorized by the Legislature to enter with their railroad and connect with the railroad of this company; and, if the respective companies shall be unable to agree upon the compensation aforesaid, it shall be the duty of the president of each company to select, each, one man as a Commissioner, and the two Commissioners so selected shall choose a third in case of disagreement, neither of whom shall be a stockholder in either road or interested therein, and they shall fix the rates, which shall not be changed for one year from the time of going into effect. The said Commissioners shall also fix the stated periods at which said cars are to be drawn as aforesaid, having reference to the convenience and interests of said corporation and the public who will be accommodated thereby. The right or power is specially conferred on this said company to connect and contract with any railroad company chartered by this State for the performance of like transport, and in case of disagreement be-

tween said companies the same shall be referred and settled as aforesaid, to be binding for one year as aforesaid.

SEC. 10. That said company may acquire real estate by gift or purchase, and that such Commissioners hereinbefore mentioned shall have full authority to solicit and receive subscriptions and conveyances of land to said company until the time fixed for the first meeting of said Commissioners, which authority may be then extended by said meeting; which land so obtained shall be alienated by said company in the following manner: One-fourth in six years, one-fourth in eight years, one-fourth in ten years, and the remaining one-fourth in twelve years from the time the same was acquired.

SEC. 11. If the track of this railway shall cross any navigable stream, it shall do it in such way as not to obstruct its navigation.

SEC. 12. Said company shall have the right to demand and receive such rates and prices for the transportation of passengers and freight as they may think proper to establish, not to exceed five cents per mile for passengers, and fifty cents per hundred pounds for freight for every hundred miles the same may be carried.

SEC. 13. If any person shall willfully injure or obstruct said railway or its property, such person may be punished when prosecuted by indictment for said offense in due course of law, and also liable to action by said company or any person whatever, who may suffer in person or property from said willful obstruction, for the amount of damages occasioned thereby.

SEC. 14. There shall be granted to said company eight sections of land of six hundred and forty acres each, for every mile of railway actually completed by them and ready for use; and upon the application of the president of the company, or any duly-authorized agent thereof, stating that any section of five miles, or more, of said railway has been completed and is ready for use, it shall be the duty of the Comptroller of public accounts to require the State Engineer, or a Commissioner to be appointed by the Governor, to examine said railway, and, upon his certificate that said section of said railway has been completed in a good and substantial manner and is ready for use, the Comptroller shall give information of that fact to the Commissioner of the General Land Office, whose duty it shall be to issue to said company land cer-

tificates to the amount of eight sections of land of six hundred and forty acres each, for each and every mile of railway thus completed and ready for use; such certificates shall be for six hundred and forty acres each, and shall be located upon any unappropriated public domain of the State of Texas within twelve months from the issuing thereof, which date shall appear upon the face of each certificate; and upon the return of the field-notes of any survey made by virtue of any certificate thus issued, it shall be the duty of the Commissioner of the General Land Office to issue patents to said company in their corporate name; one-fourth of which said lands thus patented shall be alienated by the company in six years, one-fourth in eight years, one-fourth in ten years, and the other fourth in twelve years, so that the whole of the lands thus granted shall pass from the hands of the company within twelve years from the date of the patents thus issued.

SEC. 15. Said company shall be required to have a good and sufficient brake upon the hindmost cars in all trains transporting passengers or merchandise, and also permanently stationed there a trusty and skillful brakeman, under a

penalty of not exceeding the sum of one hundred dollars for each offense, to be recovered in any court of competent jurisdiction for the benefit of the State; and said company shall cause to be placed on each locomotive engine passing over their road a bell of the weight of at least thirty-five pounds, or a steam whistle, and the said bell shall be rung or the whistle blown at the distance of at least eighty rods from the place of crossing any highway or turnpike, and kept ringing or blowing until the engine has passed or stopped. Said company shall be required to construct their railroad with good T or U iron rails; *provided*, that no land shall be donated unless the company shall actually commence their road within two years, and actually complete and finish at least ten miles within three years.

SEC. 16. Nothing in this act shall be so construed as to confer banking privileges or powers of any kind whatever.

SEC. 17. If said railway shall not be commenced within five years from the passage of this act, and at least twenty miles thereof completed within six years, then this charter shall be null and void; and it is hereby provided

and declared that it shall be lawful for any other railway hereafter to be constructed to cross the said railway, or any branch thereof, or to connect at any point therewith.

SEC. 18. The said company shall have the right to take and hold so much of the public lands, not exceeding two hundred feet wide, as the said railway or any of its branches may pass through for the track thereof, and such additional width as may be absolutely necessary for any depot or other work for the purposes of the railway that the company may deem proper to establish; and, in all cases where such railway or branch shall pass through any public lands, all such land, to the depth of three miles from the exterior line of the track on each side thereof, shall be, and hereby are, reserved for the State from and after the time such track shall be fixed or designated by survey, reconnaissance or otherwise; and the said lands, as fast as the road is constructed, shall be divided into sections fronting one mile each on the road, which sections shall be numbered and the corners of such section on the road plainly marked; and of these reserved lands the company shall have the right, by virtue of any of their cer-

tificates issued in accordance with the provisions of this act, to cause to be located, surveyed and patented for their use each alternate section, such section in each instance embracing a tract of land fronting one mile on said road and extending back three miles, preserving an equal width, and the remaining sections shall continue the property of the State until disposed of by the Legislature.

Approved February 14, 1852.

(The above act is published as Chapter CXLVIII. of the Special Laws of the Fourth Legislature of Texas, pp. 142–147.)

An Act Supplementary to the Acts to Establish the Galveston and Red River Railway Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the preliminary action of Ebenezer Allen and others associated with him as Commissioners of the Galveston and Red River Railway Company, in commencing the survey and grade of said railway at the City of Houston, is hereby confirmed.

SEC. 2. Said company is also hereby further authorized and empowered to extend said railway to the City of Galveston, and also to make and construct simultaneously with the main railway, described in the original acts establishing said company, a branch thereof towards the City of Austin, under the same restrictions and stipulations provided in said original acts, and subject to the rights of the State, to regulate the tolls by general laws.

SEC. 3. This act shall take effect immediately.

Approved February 7, 1853.

(The above act is published as Chapter XIX., pages 36, 37, of the Special Laws of the Fourth Legislature of Texas, extra session.)

An Act to Encourage the Construction of Railroads in Texas by Donations of Lands.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that any railroad company chartered by the Legislature of this State, heretofore or hereafter constructing within the limits of Texas a section of twenty-five miles or more of railroad, shall be entitled to receive from

the State a grant of sixteen sections of land for every mile of road so constructed and put in running order.

SEC. 2. That any railroad company having actually put under contract as much as twenty-five miles of its road, or its entire road when the length may not exceed twenty-five miles, upon filing a certified copy of such contract with the Commissioner of the General Land Office, and upon depositing with the Treasurer of the State a bond with two or more good sureties, to be approved by him in favor of the Governor of the State, in the sum of ten thousand dollars, conditioned as hereinafter required, may file an application with any district surveyor of any land district in this State, a copy of which application shall in all cases be forwarded to the Commissioner of the General Land Office by the district surveyor, to survey any quantity of the public domain lying and being in such district, and subject to location and entry, not to exceed eight hundred sections; and said application shall specifically describe the lands applied for and intended to be surveyed; and if said company shall produce and file with the district surveyor a certificate of the Commissioner of the General Land Office that

a copy of its contract has been filed in said office for the construction of twenty-five miles or more of said road, and, also, a certificate from the Treasurer that a bond as required by this act has been deposited in his office, said application shall exempt the land so designated from any future location, entry or pre-emption privilege until otherwise directed as hereinafter provided; provided, that no application for a survey of lands under the provisions of this act shall be made for more than six months before the completion of such section; and, if said section be not completed and notice thereof given as herein provided within six months from the time of the application, then such land applied for shall become subject to location and entry as if no such application had been made.

SEC. 3. That it shall be the duty of said company to cause to be surveyed the land so designated into sections of six hundred and forty acres each, and in square blocks of not less than six miles, unless prevented by previous surveys or a navigable stream, which surveys shall be delineated upon a map or maps, the even and odd sections being differently colored and regularly

numbered from one upwards to the full number contained in the block, and the field notes of said surveys and map or maps shall be by said company deposited with the Commissioner of the General Land Office.

SEC. 4. That the condition of the bond mentioned in the second section of this act shall be that said company will cause to be surveyed the land designated and applied for within the time limited for the construction of said section of twenty-five miles by the contract, and in the manner required by the third section of this act; and shall actually construct the said section of twenty-five miles of said road within the time mentioned in said contract, in default of which said land shall become forfeited to the use of the State, which forfeiture shall be declared by the District Court of Travis County at the first term thereafter without other formality than as hereinafter provided.

SEC. 5. That if, at the time stipulated in said contract for the completion of said section of twenty-five miles, the field notes and map or maps of the land applied for be not deposited in the General Land Office as herein required, it shall be the duty of the Commissioner to for-

ward immediateiy to the Treasurer of the State and the district surveyor of the land district where the land applied for is situate, a certificate of the fact, whereupon the land so applied for shall become subject to location and entry by any one as if no such application had been made; and it shall be the duty of the Treasurer ten days before the session of the District Court of Travis County to cause notice of such forfeiture to be advertised in one of the newspapers published at Austin for two successive weeks; and at said session of the District Court it shall be the duty of the Attorney-General, or, in case he be not present, of the District-Attorney, to file a motion for the forfeiture of said bond, whereupon said Court shall proceed without other citation or notice to declare said bond absolutely forfeited and to render judgment against said company and sureties for the amount of said bond, upon which judgment execution shall issue as in ordinary cases; provided, that it shall be necessary for the Attorney-General or District-Attorney to file with said motion a certified copy of said bond under the hand and seal of the Treasurer, and also a copy of the contract deposited in the General Land

Office, and a certificate of the Commissioner that said surveys and map or maps of the lands applied for have not been returned.

SEC. 6. That any railroad company having completed and put in running order a section of twenty-five miles or more of its road may give notice of the same to the Governor, whose duty it shall be to appoint some skillful engineer, if there be no State Engineer, to examine said section of road, and if upon the report of said engineer, under oath, it shall appear that said road has been constructed in accordance with the provisions of its charter and of the general laws of the State in force at the time regulating railroads, thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company patents for the odd sections surveyed in pursuance of the second and third sections of this act; but in case said lands, or any part thereof, shall not have been surveyed at the time said section is completed, then it shall be the duty of said Commissioner to issue to said company certificates of 640 acres each, equal to sixteen sections per mile of road so completed, whereupon said company may apply to the district surveyor

of any land district in this State to survey any quantity of vacant land subject to location and entry in such district, not to exceed twice the quantity of certificates so issued, which surveys shall be made, numbered and colored as directed in the third section of this act; and upon the return of the field notes and map or maps of such surveys to the General Land Office, and the certificates so issued, it shall be the duty of the Commissioner to issue to said company patents for the odd sections of said surveys; provided, that in case the surveys are not applied for before the completion of any section of road, it shall not be necessary to deposit with the Treasurer a bond as required in the second section of this act.

SEC. 7. That fractional sections containing more than 320 acres shall be regarded as whole sections; and two fractional sections, each containing less than 320 acres, shall be taken as a whole section under the provisions of this act; and all the alternate or even sections shall be reserved to the use of the State until appropriated by law.

SEC. 8. That surveys under the provisions of this act may be made by persons employed by the company, and the field notes may be de-

posited with the Commissioner of the General Land Office without being recorded in the office of the district surveyor; provided, that the State in no case shall be liable for surveying any part of said lands, nor shall any company pay for the fees of patenting the odd sections as herein provided.

Sec. 9. That any railroad company in this State acquiring lands or other real estate by virtue of the provisions of this act, or by virtue of the provisions of any other act or charter enacted by the Legislature of the State of Texas, by purchase, donation or otherwise, shall proceed to alienate the same except so far as may be necessary to the maintenance and running of said road, in six, eight, ten and twelve years; that is, one-fourth shall be alienated in six years, one-fourth in eight years, one-fourth in ten years, and one-fourth in twelve years from the time of acquiring such lands or real estate, in such manner that the whole of such lands or real estate shall pass out of the hands of such company within twelve years from the date of its acquisition; provided, moreover, that said land and real estate shall in no instance be alienated to any other corporation, except so far as may

be necessary for the proper uses and the conduction of the business of such corporation.

SEC. 10. That if any company should neglect or fail to alienate its lands or real estate as herein directed, evidences of which alienations said company shall cause to be filed with the Secretary of State, it shall be the duty of that officer to notify the Comptroller of Public Accounts and Commissioner of the General Land Office of such failure to alienate, whereupon the Commissioner shall furnish the Comptroller with a list of the lands acquired by said company under this or any other act of the Legislature of the State, and the dates at which such lands were acquired; and the Secretary of State shall also furnish the Comptroller with a schedule of the lands owned and alienated by said company, as the same appears from the last annual return made to his office by said company, in pursuance of the general law of the State regulating railroad companies; and it shall be the duty of the Comptroller of Public Accounts, immediately upon receiving said returns, to cause to be advertised in the newspapers in the City of Austin for sale, sixty days after such advertisement, the lands therein directed to be alien-

ated, proceeding in the order in which said lands and real estate were granted or deeded to said company; and, after deducting all necessary expenses of the sale, the balance shall be deposited with the Treasurer to the credit of said company.

SEC. 11. That all the alternate or even sections of land surveyed in pursuance of the provisions of this act, or of any other act of the Legislature of this State, donating lands to any railroad company, shall be reserved to the use of the State, and not liable to locations, entries or preemption privileges until otherwise provided by law.

SEC. 12. That the provisions of this act shall not extend to any company receiving from the State a grant of more than sixteen sections of land, nor to any company for more than a single-track road, with the necessary turnouts; and any company now entitled by law to receive a grant of eight sections of land per mile for the construction of any railroad, accepting the provisions of this act, shall not be entitled to receive any grant of land for any branch road; provided, this act shall not be so construed as to give to any company now entitled by law to receive

eight sections of land, more than eight additional sections; provided, that no person or company shall receive any donation or benefit under the provisions of this act, unless they shall construct and complete at least twenty-five miles of the road contemplated by their charter within two years after the passage of this act; and such donations shall be discontinued in every case where the company or companies shall not construct or complete at least twenty-five miles of the road contemplated by their charter each year after the construction of said first-mentioned twenty-five miles of road; and further provided, that the proviso herein contained shall not extend to any railroad the terminus of which is not fixed on the Gulf Coast, the bays thereof, or on Buffalo Bayou, and that nothing in this section shall be construed as to extend the duration of any existing charter; and further provided, that the certificates for land issued under the provisions of this act shall not be located upon any land surveyed or titled previous to the passage of this act; and further provided, that this act shall continue in force for the term of ten years from the time it shall take effect and no longer.

SEC. 13. That no railroad hereafter to be built shall be entitled to receive the additional sections of land herein granted unless the railings of such road shall weigh at least fifty-four pounds to the yard.

Approved January 30, 1854.

(The above act is published as Chapter XV., pages 11–15, General Laws, passed by the Fifth Legislature of Texas.)

An Act Supplemental to "An Act to En-"courage the Construction of Rail-"roads in Texas by Donations of Land."

SECTION 1. Be it enacted by the Legislature of the State of Texas, that no railroad company availing itself of the provisions of the act to which this is a supplement shall receive more than sixteen sections of land to the mile by virtue of said act, or any *proviso* therein contained. And no road benefited by said act shall receive any donation of land under its charter, or under the act to which this is a supplement, for any-work not done within ten years after the passage of this act; and this act shall be in force at the

same time that the act to which this is a supplement shall take effect.

Approved January 30, 1854.

(The above act is published as Chapter XVI., page 16, General Laws, passed by the Fifth Legislature of the State of Texas.)

An Act for the Relief of the Galveston and Red River Railway Company, and Supplementary to the Several Acts Incorporating Said Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Galveston and Red River Railway Company shall have six months after the thirtieth of January, 1856, to complete the first twenty-five miles of their road, commencing at the City of Houston; and if said company shall complete said twenty-five miles within said six months after the thirtieth day of January, 1856, its failure to complete any portion of its road before that shall not operate as a forfeiture of any of the rights of said company. But said company shall be entitled to the rights, benefits and privileges granted by an

act approved January thirtieth, eighteen hundred and fifty-four, entitled "An Act to encour- "age the construction of railroads in Texas by "donations of lands," upon the completion of said twenty-five miles within said six months, and the rights, benefits and privileges of said act shall be confined to said company; *provided* it shall construct and complete twenty-five miles of road each year after the expiration of said time; *provided*, that said company shall keep their principal office on the line of said road during the continuance of their charter, with all the books, papers and accounts of said company, which shall at all times be subject to the inspection and examination of any stockholder of said company; *and, provided*, that a majority of the directors of said company shall be required to reside in the State of Texas; all elections of directors and other officers shall be held in the said State; *provided further*, that said company shall be required to complete the main trunk of said road to the thirty-second degree of north latitude, or until they shall connect with some road reaching to or in the vicinity of Red River before they shall commence any branch road; *provided further*, that the Act to Regulate Railroad Companies, ap-

proved 7th February, 1853, shall apply to this charter.

SEC. 2. That upon the application of the said company, at any time, for the benefits of the acts approved January the thirtieth, eighteen hundred and fifty-four, and referred to in the first section, it shall be proven to the satisfaction of the Governor that said company has established and kept its principal office, books and papers on the line as required by the first section of this act.

SEC. 3. That upon the completion of any number of miles of said road, as required by the charter of said company and the act of January the thirtieth, eighteen hundred and fifty-four, and the issuance of any land certificates to which said company may be entitled for said completion, said company may assign said land certificates by any instrument in writing under their corporate seal and signed by their president or other authorized agent. And the assignee shall have the same rights and be governed by the same provisions as said company in respect to the locations of said certificates, and may have the patents issued on said certificates, made to him, in his own name, and the title of the assignee shall thereupon be absolute.

SEC. 4. That said company is authorized to borrow money from time to time for the construction of their railway, and to secure such loan by pledging and mortgaging the property, both real, personal and mixed, of said company, and to issue bonds with interest, warrants annexed and payable at such time and place as the directors may deem proper; and that said company shall have the right, after the location and survey or patent of said certificates, or any part of them, to mortgage, hypothecate or sell any part of said lands by any instrument in writing under their corporate seal, and signed by their president or other authorized agent. But no sale or assignment made under the third and fourth sections of this act by said company to any party with any trust reserved to said company, either expressly or impliedly, shall be valid; *and provided*, that the provisions of this section shall in no way release said company from the requirements of selling their lands within the time now required by law.

SEC. 5. That said railroad company in accepting the benefits of this act shall yield all general branching privileges, except such as are expressly granted by the provisions of its charter

to certain points, and shall be required to spend only so much of its capital stock upon any branch as shall be expressly subscribed to such branch, and shall not spend upon its trunk any moneys subscribed to any branch, and shall be required to complete its main trunk to the point on Red River comtemplated in its charter, or to such point of intersection between said road and some other road running from the northern or eastern boundary of Texas towards El Paso, as shall be agreed upon between the directors of said company.

SEC. 6. That nothing in this act shall be so construed as to effect [affect] the right of the State to repeal or modify the Act of January 30th, 1854, entitled "An Act to encourage the con- "struction of railroads in Texas by donations "of land;" *provided*, that the rights to lands acquired before said repeal or modification shall in all cases be protected.

SEC. 7. That this act take effect and be in force from and after its passage.

Approved 23d January, 1856.

(The above act is published as Chapter XX., pp. 28–30, Special Laws of the Sixth Legislature of Texas.)

An Act to Incorporate the Washington County Railroad Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that James W. McDade, John Stamps, R. R. Peebles, Terrel J. Jackson, Joseph C. Wallis, A. M. Lewis, Hosea Garrett, A. M. M. Upshan, Jas. H. Stephens, W. J. Hutchins, William M. Rice, Cornelius Ennis and T. J. Allcum be, and they are hereby, appointed Commissioners to open books and receive subscriptions to the capital stock of a corporation to be styled the "Washington County Railroad Com-" pany," but they shall receive no subscription to said capital stock unless five per cent. thereof in cash shall be paid to them at the time of subscribing; and, should they receive subscriptions to said stock without such payment, they shall be personally liable to pay the same to said corporation when organized. A majority of said Commissioners shall constitute a quorum to do business, and they may hold their meetings at such times and places as a majority shall designate; *provided*, that public notice of all such meetings shall be given by publication in some newspaper printed in Washington County at least twenty days before any such meeting.

SEC. 2. That the subscribers to said capital stock, whenever they shall have elected directors in the manner hereinafter provided, shall be, and they are hereby, created and established a body corporate and politic, under the name and style of the "Washington County Railroad Company," with capacity in said corporate name to make contracts, to have succession and a common seal, to make by-laws for the government and regulation of the said company, to sue and be sued, to plead and be impleaded, to grant and receive, and generally to do and perform all such acts as may be necessary and proper for or incident to the fulfillment of its obligations, for the maintainance [maintenance] of its rights under this act, and in accordance with the Constitution and laws of the State.

SEC. 3. That the capital stock of said corporation shall be one million of dollars, and it shall have power to increase the same to two millions of dollars. The said corporation shall be, and is hereby, invested with the right of locating, constructing, owning and maintaining a railway commencing at such point on the trunk of lhe Galveston and Red River Railroad as said corporation shall deem most suitable, crossing the

Brazos River within the limits of Washington County, and then running by the most suitable and direct line to Brenham in said county.

Sec. 4. That the capital stock of said company shall be divided into shares of one hundred dollars each, each share entitling the owner thereof to one vote, in person, or by proxy, at all meetings of the company, and the shares shall be deemed personal estate and shall be transferable by any conveyance in writing recorded either by the treasurer in books kept by him for that purpose at his office, or by any other officer duly authorized by the directors in books kept by him at such other place as the directors may appoint; such transfers as are recorded in any other place being within ninety days communicated to the Treasurer, and by him entered on his books.

Sec. 5. That the immediate control and direction of the affairs of said corporation shall be vested in a board of not less than five directors. said directors shall elect one of their own number to be president of the company. Whenever two hundred thousand dollars of the capital stock of said corporation shall have been subscribed and five per cent. thereof shall have been paid to the

Commissioners hereinbefore named, they shall cause an election to be held by said subscribers at the Town of Chappell Hill, in Washington County, for not less than five directors, having first given public notice of the time of said election in some newspaper published in said county, after which the said Commissioners shall account for and pay over to said directors all such sums as they shall have received of the capital stock of said company, first deducting a reasonable compensation for their services as Commissioners. No person shall be eligible to the office of director unless he be a subscriber or owner of at least three shares of the capital stock. The directors shall have power to fill any vacancy in their body arising from non-election or other cause. They shall have power to appoint a clerk, treasurer or any other officers or agents as they may deem necessary, and prescribe and require bonds for the faithful performance of their duties. They may make all necessary rules and regulations for holding of meetings, and all other things they may deem proper for the carrying out the provisions of this charter and business of the company. They shall keep, or cause to be kept, correct records of all meetings of the directors

and company, and accurate books and accounts of the receipts and expenditures of the company, and all other books and accounts necessary and proper to be kept by such company, which books shall be open to the inspection of the stockholders. A majority of the Board of Directors shall have the power of a full board, and all conveyances and contracts executed in writing, signed by the president and countersigned by the treasurer, or any other officer duly authorized by the directors, under the seal of the company and in pursuance of a vote of the directors, shall be valid and binding.

SEC. 6. That the directors shall have power to receive further subscriptions to the capital stock of said corporation from time to time until the full amount thereof shall have been subscribed; but five per cent. of all such subscriptions shall be paid in cash at the time of subscribing, and the directors shall be personally liable to said company for five per cent. of all subscriptions they may receive to said capital stock without such payment; *provided*, however, that said company may, by the vote of a majority of the stockholders, cause certificates of stock to be issued in payment of any debt contracted for the construction or

equipment of their road, and any agreement in writing whereby any person shall become a subscriber to the capital stock of said company shall be enforced against him according to its terms. If any subscriber shall fail to pay any amount due upon shares subscribed for by him according to the terms of his subscription, the directors may, after twenty days' public notice, sell at public auction the shares subscribed for by said delinquent, and transfer to the purchaser such shares. If the proceeds of sale shall not be sufficient to pay the amount due, with interest and charges, such delinquent shall be held liable to the company for the deficit, and if the proceeds shall exceed the amount so due, with interest and charges, he shall be entitled to the surplus.

SEC. 7. That it shall be lawful for the company to purchase and hold any land that may be necessary for the purpose of locating, constructing and maintaining said railway, with all necessary depots and other buildings, and, by their engineers or agents, enter upon and take possession of all such lands as may be necessary for the locating, constructing and maintaining said railway, and if they shall not be able to obtain such lands by agreement with the owner

they shall pay for the same such amounts as shall be determined in the manner provided for in the following section. The land so taken for the railroad shall not exceed fifty yards in width, and for depots and buildings only such further width as may be necessary.

SEC. 8. That any person from whom lands have been taken for the purposes set forth in the preceding section may apply to the District Court of the county wherein said lands are situated for the appointment of appraisers, and said Court, after proof that the president or other officers of the company has been served with a notice, describing the land, ten days before the holding of the Court, shall thereupon appoint three disinterested freeholders, citizens of the county, who shall appoint a time and place to hear the application, and the company, to whose agent or president a reasonable notice shall be given by the Court of said time and place, and said freeholders being sworn, shall, after hearing the parties, determine the amount of compensation as aforesaid and make return of their award to said Court at its next term, and said award may be confirmed or for any sufficient reason rejected by said Court in

the same manner as awards by arbitrators under a rule of court; and, if confirmed by the Court, judgments shall be rendered thereon as in other cases. In determining the amount of compensation to be paid as aforesaid, freeholders shall be governed by the actual value of the land at the time it was taken, taking into consideration the benefit or injury done to the other neighboring lands of the owner by the establishment of said railway. If in any case the amount found by the arbitrators shall not exceed the sum proved to have been offered by the company to the owner prior to his application to the Court, the owner shall pay the costs of proceedings; otherwise, the company shall pay the same.

SEC. 9. That said company shall have power to borrow money on their bonds or notes at such rate as the directors deem expedient; *provided*, however, that nothing in this act shall be construed to confer banking privileges of any kind.

SEC. 10. That upon the written request of one-fourth of the stockholders the president of the company shall call a special meeting of the directors, and upon the written demand of three-fourths of the stockholders the president shall remove any one, or the whole, of the directors,

and order a new election within thirty days, which directors so elected shall hold their offices until the time prescribed for the next regular election.

SEC. 11. That if said railway is not commenced within twelve months from the first day of July, 1857, and at least ten miles are in running order within three years after its commencement, then this charter shall be null and void.

SEC. 12. That the company is hereby required at all reasonable times and for a reasonable compensation to draw over their road the passengers, merchandise and cars of any other railroad corporation which has been or may hereafter be authorized by the Legislature to enter with their railroad and connect with the railroad of this company; and, if the respective companies shall be unable to agree upon the compensation aforesaid, it shall be the duty of the president of each company to select, each, one man as a Commissioner, and the two Commissioners so selected shall choose a third, in case of disagreement, neither of whom shall be a stockholder in either road or interested therein, and they shall fix the rates, which shall not be changed for one year from the time of going

into effect. The said Commissioners shall also fix the stated periods at which said cars are to be drawn as aforesaid, having reference to the convenience and interests of said corporations and the public who shall be accommodated thereby. The right or power is specially conferred on this company to connect and contract with any company heretofore or hereafter chartered by this State for the performance of like transport, and in case of disagreement between companies the same shall be referred and settled as aforesaid, to be binding for one year as aforesaid.

SEC. 13. That this act of incorporation shall expire in ninety years unless it shall be renewed or extended.

SEC. 14. That this company shall be subject to the provisions and be entitled to the benefits of any general laws which have been or may be enacted by the State, regulating or encouraging the construction of railroads, and that this act take effect from its passage.

Approved 2d February, 1856.

(This act is published as Chapter XLIV., pages 49–53, of the Special Laws passed by the Sixth Legislature of Texas.)

An Act Amendatory of and Supplementary to an Act to Establish the Galveston and Red River Railway Company, and the Several Acts Supplemental Thereto.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Galveston and Red River Railway Company may change its name to that of the Houston and Texas Central Railway Company, and by that name may sue and be sued, grant and receive, and generally do and perform all such acts and things as they could legally do under their present name; and all acts heretofore done in said name shall be as binding upon said company and in favor of said company upon third parties in said new name as they were under the first name; and said change of name shall in no way forfeit or change any rights or liabilities now existing between said company and the State or third parties; provided, that this act shall first be accepted by the president and directors of said company and notice of said acceptance shall be filed in the office of the Secretary of State.

SEC. 2. That said company shall have the right to cross any navigable stream by ferry, bridge or otherwise, and shall have the right to acquire and exercise such ferry privileges as may be necessary for its business, and said road crossing any such stream by a good and convenient ferry shall be considered as continuous as if crossing upon a bridge; provided, that same shall not obstruct the navigation of any such stream.

SEC. 3. That a failure to complete the second section of twenty-five miles of the road of said company within one year after the construction of the first section shall not work a discontinuance as to said company of the benefits of the act entitled "An Act to encourage the construc-" tion of railroads in Texas by donations of lands," or of any other general or special laws relative to railroads, if said company shall have completed their second and third sections, amounting to at least fifty miles, at the expiration of two years after the construction of said first section.

SEC. 4. That section twelfth of the act supplementary to the act to establish the Galveston and Red River Railway Company, passed February, eighteen hundred and fifty-two, be, and the

same is hereby, amended so as to read as follows: Said company shall have the right to demand and receive such rates and prices for the transportation of passengers and freight as they may think proper to establish, not to exceed five cents per mile for passengers and fifty cents per hundred or twenty-five cents "per foot" for freight per every hundred miles the same may be carried.

SEC. 5. That this act take effect and be in force from and after its passage.

Passed September 1st, 1856.

(The above act is published as Chapter CCCLI., pages 259, 260, of the Special Laws, passed by the Sixth Legislature of Texas at its adjourned session.)

An Act for the Relief of the Houston and Texas Central Railway Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Houston and Texas Central Railway Company be, and said company is hereby, permitted to extend their road northward, beyond the limits of the State,

into the United States Indian Territory, and the Territory of Kansas, with the consent of the political authorities of said Territory.

SEC. 2. That the failure of the Houston and Texas Central Railway Company to complete the third section of twenty-five miles of its road by the 30th day of July, 1858, shall not work a discontinuation, as to the said company, of the benefits of the act entitled "An Act to encourage "the construction of railroads in Texas by the "donation of land," or any other general laws in reference to railroads, if said company shall complete said third section by the 30th day of July, 1859; and that on the completion of subsequent sections of twenty-five miles annually after said 30th day of July, 1859, or fifty miles every two years, said company shall be entitled to sixteen sections of land per mile, contemplated in said last-mentioned act, for each section so completed; and, whenever a failure shall occur on the part of said company to complete a section within the time required, then the land, applicable to that section only, shall be forfeited, and the completion of future sections within the time contemplated by law shall entitle the company to the benefits of said last-mentioned act as fully as if

no failure had been made in completing any former section, except as to the section on which the failure occurred; *provided*, that the benefits of the provisions of any general law shall only inure to the said railroad company whilst said laws shall remain in force.

SEC. 3. That said company be, and they are hereby, authorized to raise any files or locations of land made by them which are, in the opinion of the Commissioner of the General Land Office, without the limits of the State of Texas; and that any district surveyor be authorized to survey the said lands upon any of the public domain of the State of Texas.

SEC. 4. That said company shall, within twelve months from the passage of this act, definitely determine the counties through which their road is to run, striking the Trinity River in the County of Dallas, and Red River within fifteen miles of the Town of Preston. And this act shall take effect and be in force from and after its passage.

Passed February 4th, 1858.

(The above act is published as Chapter 86, pages 94, 95, Special Laws, Seventh Legislature of Texas.)

An Act for the Relief of the Houston and Texas Central Railway Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the failure of the Houston and Texas Central Railway Company to complete the fourth and fifth sections of twenty-five miles each of its road by the thirtieth day of July, 1861, shall not work a discontinuance, as to the said company, of the benefits of the act entitled "An Act "to encourage the construction of railroads "in Texas by the donation of land," or any other laws in reference to railroads, if said company shall complete said fourth and fifth sections by the thirtieth day of January, 1863, and shall thereafter complete twenty-five miles of its road annually, or fifty miles every two years thereafter; *provided*, said railroad shall run on the nearest and most practicable route from its line at or near Horn Hill to Dresden, in Navarro County, and thence to the Town of Dallas, or within one and a half miles of said town, and thence to the terminus of Red River, within fifteen miles of Preston. And said company shall have said road surveyed, staked

and permanently located to Dresden, or within one mile of said town, by the first day of April, A. D. 1862.

SEC. 2. That this act shall take effect from and after its passage.

Approved February 8th, 1861.

(The above act is published as Chapter XIII., pages 11, 12, Special Laws, passed by extra session of Eighth Legislature.)

An Act for the Relief of Companies Incorporated for Purposes of Internal Improvement, by Allowing Them Further Time for the Performance on Account of the Pending War.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the time of the continuance of the present war between the Confederate States and the United States of America shall not be computed against internal improvement companies in reckoning the period allowed them in their charters, by any law, general or special, for the completion of any work contracted by them to do; *provided*, that this act shall not

be construed as to revive any charter of a railroad company which has been forfeited prior to the 21st day of May, 1861.

SEC. 2. The president and directors of the Houston and Texas Central Railroad Company shall, before the provisions of this act shall extend to the benefits of said company, pass a resolution restoring the original *bona fide* stockholders of said company—those who have paid for their stock—to all the rights, privileges and immunities to which they were entitled previous to, and of which they were divested by, the sale of the said road to W. J. Hutchins and others, and shall forward to the Governor of the State a copy of said resolution, signed by the president and countersigned by the secretary or treasurer, under the seal of said company, and said company shall not have the power to repeal said resolution so as to defeat the object of this act; *provided*, that if the said *bona fide* stockholders should fail to pay into the treasury of said company ten per cent. upon their said stock, on or before the expiration of the extension of time provided in this act for the fulfillment of the charter obligations of said company to the State, then and in that case said stockholders shall

forfeit all their rights, privileges and property interests as stockholders in said road.

SEC. 3. The president and directors of any railroad company in this State shall not have the power to sell out stockholders in said company by virtue of any law now in force, until the expiration of the time of extension provided in this act for the fulfillment of its charter obligations to the State.

SEC. 4. The provisions of any law, contrary to those of this act, shall have no force or effect so far as they may conflict with the provisions of this act, and this act shall take effect and be in force from and after its passage.

Approved January 11th, 1862.

(The above act is published as Chapter LXII., pages 43, 44, General Laws, passed by regular session of Ninth Legislature of Texas.)

An Act for the Relief of Railroad Companies.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the failure of any chartered railroad company in this State to complete any section or fraction of section of its

road, as required by the existing laws, shall not operate as a forfeiture of its charter or of the lands to which said company would be entitled, under the provisions of an act entitled "An Act "to encourage the construction of railroads in "Texas by donations of land," approved January 30th, 1854, and the several acts supplementary thereto; provided said company shall complete such section or fraction of a section as would entitle it to donations of land under existing laws within two years after the close of the present war between the Confederate States and the United States of America.

SEC. 2. That, during the time named in the first section of this act, any such company having completed and in running order twenty-five miles of its road shall be entitled to receive from the State a grant of sixteen sections of land for every mile of road constructed, or which may hereafter be constructed and put in running order, beyond the said section of twenty-five miles; *provided*, that no company shall receive from the State more than sixteen sections of land per mile for any portion of its road now or hereafter constructed, unless otherwise provided by its charter or special provision of some law.

SEC. 3. That, upon the application of any company which may have completed any portion of its road beyond the said section of twenty-five miles, the Commissioner of the General Land Office shall issue to said company certificates for the lands to which it may be entitled under the provisions of this act, and which may have been designated and caused to be surveyed by said company in accordance with existing laws; *provided*, that this act shall not be so construed as to conflict with, or in any manner alter or change, the provisions of an act entitled "An "Act for the relief of the Memphis and El "Paso Railroad Company, and all other railroad "companies," passed March 20th, 1861.

SEC. 4. That the lands to which any such company may now be entitled in pursuance of this act may be designated, surveyed and patented at any time within two years after the passage of this act; and the president and directors of the Houston and Texas Central Railway Company shall, before the provisions of this act shall extend to the benefit of said company, pass a resolution restoring the original *bona fide* stockholders of said company—those who have paid for stock—to all the rights, privileges and

immunities to which they were entitled previous to, and of which they were divested by, the sale of said road to W. J. Hutchins and others, and shall forward to the Governor of the State a copy of said resolution, signed by the president, and countersigned by the secretary or treasurer, under the seal of said company; and said company shall not have the power to repeal said resolution so as to defeat the object of this act; provided, that if the said original *bona fide* stockholders should fail to pay into the treasury of said company ten per cent. upon their said stock on or before the expiration of the extension of time provided in this act for railroad companies to fulfill their charter obligations to the State, then, and in that case, said stockholders shall forfeit all their rights, privileges and property interests as stockholders in said road.

SEC. 5. That this act take effect and be in force from and after its passage.

Approved January 11th, 1862.

(The above act is published as Chapter LXIX., pages 46, 47, General Laws, passed at regular session, Ninth Legislature of Texas.)

An Act Granting Lands to the Houston and Texas Central Railway Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Houston and Texas Central Railway Company shall be entitled to receive from the State a grant of sixteen sections of land, of six hundred and forty acres each, for every mile of road it has constructed, or may construct, and put in running order, "in "accordance with the provisions of the charter "of said railroad company;" *provided*, that the lands heretofore drawn by said company, by virtue of an act to encourage the construction of railroads in Texas by donations of lands, "approved January 30th, 1854," be deducted from the amount of lands granted hereby; *and provided, further*, that the land certificates heretofore issued to this company on the three first sections of their road, by virtue of the act aforesaid, be included in the terms, benefits and conditions of this act as if issued by virtue of its provisions; *and further provided*, that said company shall construct and put in running order a section of twenty-five miles of additional road to that now built within one year from January 1st,

1867, or fifty miles within two years from that date; and such grant of land shall be discontinued when said company shall fail to construct and complete at least twenty-five miles of the road contemplated by their charter each year after the construction of said first-mentioned fifty miles of road; *provided*, that said road shall be put in running order to Bryant's Station, and cars run regularly thereon, by the first day of September, 1867.

SEC. 2. Whenever said company shall have completed and put in running order a section of twenty-five miles or more of its road beyond the point which land has been granted and drawn, they may give notice of the same to the Governor, whose duty it shall be to appoint some skillful engineer to examine said section of road, and if, upon the report of said engineer, under oath, it shall appear that said road has been constructed in accordance with the provisions of its charter, and of the general laws of the State, in force at the time, regulating railroads, thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company certificates of six hundred and forty acres each, equal to sixteen sections

per mile of road so completed; thereupon said company may apply to the district surveyor of any land district to survey any quantity of vacant land subject to location and entry, in such district, not to exceed twice the quantity of certificates so issued, and may cause to be surveyed the land so designated into sections of six hundred and forty acres each, or half sections of three hundred and twenty acres each, which surveys shall be delineated upon a map or maps, the even and odd sections and half sections, and being differently colored and regularly numbered from one upwards to the full number contained in the block; and the field notes of said survey, and map or maps, shall be by said company deposited with the Commissioner of the General Land Office, and it shall be the duty of said Land Commissioner to issue to said company patents for the odd sections and half sections of said surveys; and all the alternate or even sections and half sections shall be reserved to the use of the State until appropriated by law, and not liable to location, entrance or pre-emption privileges.

SEC. 3. That surveys under the provisions of this act shall be made by deputies and district

surveyors of the districts in which the land is situated, and the field notes shall be recorded in such district and returned to the General Land Office as other surveys; and said railroad company shall construct their road in the line heretofore prescribed by "An Act for the relief of "the Houston and Texas Central Railway Com- "pany," approved February 8th, 1861.

Approved September 21, 1866.

(The above act is published as Chapter XI., pages 33, 34, Special Laws, passed by Eleventh Legislature of Texas.)

An Act for the Benefit of Railroad Companies.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the grant of sixteen sections of land to the mile to railroad companies heretofore or hereafter constructing railroads in Texas shall be extended, under the same restrictions and limitations heretofore provided by law, for ten years after the passage of this act.

SEC. 2. That the time for the alienation of the lands acquired by railroad companies heretofore shall be extended to fourteen for the alienation of

one-half of such lands, and to twenty-one years for the alienation of the other half; and in the event such alienation does not take place, the said lands shall be forfeited to the State; and companies hereafter acquiring lands shall alienate the same in fourteen and twenty-one years from the date of the acquisition, under a like penalty of forfeiture.

SEC. 3. That the benefits of this act shall not apply to any company hereafter that avails itself of the provisions of the 2d, 3d, 4th and 5th Sections of an act entitled "An Act to encourage the construction " of railroads in Texas," approved January 30th, 1854, or of the act supplementary thereto, approved February 16th, 1858.

SEC. 4. That it is not intended by the preceding section to interfere with or impair the rights which have heretofore been acquired by companies under laws heretofore in force, but to preclude companies from hereafter taking advantage of the provisions of Sections 2, 3, 4 and 5 of the Act of January 30th, 1854, and the supplementary Act thereto of 16th February, 1858; *provided*, that all tap roads over twenty-five miles long shall be entitled to the benefits of this act.

SEC. 5. That this act be in force from its passage.

Approved November 13, 1866.

(The above act is published as Chapter CLXXIV, p. 212, General Laws Eleventh Legislature of Texas.)

Declaration Respecting the Central Railroad Company.

WHEREAS, The Houston and Texas Central Railroad Company has become the owner, by purchase, of the Washington County Railroad; and,

WHEREAS, The said Houston and Texas Central Railroad Company and the Washington County Railroad Company are indebted to the State of Texas for sums borrowed from the Special School Fund; and,

WHEREAS, The said Houston and Texas Central Railway is desirous to extend the Washington County Branch to the City of Austin as soon as it can be done, and to build their main trunk to Red River in the shortest time possible, and upon the best ground; and to strike Red

River at such point as will enable said company to form a connection with any railroad that may be built southward from Kansas or Missouri to Red River; and,

WHEREAS, The ability of said company to build said main trunk and branch road would be greatly increased by the consent of the State to exchange the six per cent. bonds of said companies, now held by the State for the seven per cent. gold-bearing bonds of said Houston and Texas Central Railway Company, issued by virtue of a deed of trust executed by said company on the first day of July, A. D. 1866, in which deed of trust Shepherd Knapp and David S. Dodge, of the City of New York, are named (and have accepted) as trustees; and,

WHEREAS, It is believed that such exchange can be made without in any manner endangering the security of the School Fund;

Therefore, be it declared by the people of Texas, in convention assembled, that the Washington County Railroad is hereby made and declared to be a branch of the Houston and Texas Central Railroad, and shall henceforth be known and called the "Western Branch of the Houston "and Texas Central Railway," and shall be con-

trolled and managed by the said Houston and Texas Central Railway Company; and the Houston and Texas Central Railway Company shall have the right to extend the said western branch of their road from the Town of Brenham, in Washington County, to the City of Austin, in Travis County, by the most eligible route, as near an air line as may be practicable.

SECTION 2. For the whole amount of principal and interest due to the State by the said Houston and Texas Central Railway Company and the Washington County Railway Company on the first day of July, A. D. 1868, including the sums paid by each of said companies in the treasury warrants or bonds of the State, the Provisional Government shall accept from the Houston and Texas Central Railway Company the seven per cent. land-grant sinking-fund first-mortgage gold interest bearing bonds of said company, which said bonds are also payable in gold, and are issued, or to be issued, by virtue of a deed of trust executed by said company on the first day of July, A. D. 1866, in which deed of trust Sheperd Knapp and David S. Dodge, of the City of New York, are trustees; and the Governor shall, after making the exchange, cancel and deliver to said company the

six per cent. bonds of the Houston and Texas Central Railway Company and of the Washington County Railway Company now held by the State for sums borrowed from the special school fund; and the exchange of bonds and settlement herein provided for shall be made at any time between the passage of this declaration and the first day of December, A. D. 1868; provided that the said Houston and Texas Central Railway Company shall never issue an amount of the said seven per cent. bonds above described to exceed twenty thousand dollars to the mile of completed road, including such bonds as have already been issued; nor shall said company ever issue any other bond that shall rank as a first mortgage bond on their road without first paying the whole amount of the indebtedness of the company to the State.

SEC. 3. The Houston and Texas Central Railway Company is hereby authorized, any former laws to the contrary notwithstanding, to build its main trunk from the present northern terminus, by the most eligible route, to be selected by the engineer or engineers of the company, to any point on Red River within thirty miles of the Town of Preston, in Grayson County.

SEC. 4. This declaration shall take effect from and after its passage; provided, that all laws and parts of laws concerning the said Houston and Texas Central Railroad, or said Washington County Railroad, not in conflict with the foregoing provisions, shall be considered as still in force; and provided, further, that the Government of the State shall be at any time authorized to interfere by such measures as may be thought necessary by the Legislature to prevent neglect of said railroads, so that the same may always remain a competent security to the State for the amount due as above set forth.

Passed August 29, 1868.

(The above is published at pages 46, 47, of the Ordinances passed by the Convention of 1868–69, which assembled under the reconstruction Acts of Congress to frame the Constitution that was adopted in 1869–70.)

Declaration for the Relief of the Houston and Texas Central Railway Company.

It is hereby declared by the people of Texas in convention assembled, that the Houston and

Texas Central Railway Company shall not suffer any forfeiture of any rights secured to it by existing laws, by reason of the failure of said company to construct and put in running order their said railway to the town of Calvert, in Robinson County, by the first day of January, A. D. 1869, as required by act of the twenty-first of September, A. D. 1866, provided said railway shall be constructed and put in good running order for the use of the public, to said Town of Calvert, by the first day of April, A. D. 1869.

Passed December 23, 1868.

(The above is published at page 59 of the Ordinances of the Constitutional Convention of 1868–1869.)

An Act for the Relief of the Houston and Texas Central Railway Company.

WHEREAS, the Houston and Texas Central Railway Company has become the owner, by purchase, of the Washington County Railroad; and,

WHEREAS, The Houston and Texas Central Railway Company and the Washington County

Railroad Company are indebted to the State of Texas for sums borrowed from the Special School Fund; and,

WHEREAS, The Houston and Texas Central Railway Company is desirous to extend the Washington County branch to the City of Austin as soon as it can be done, and to build its main trunk to Red River in the shortest time possible, and also to build a branch road from some point in Navarro County so as to strike Red River at such point as will enable said company to form a connection with any railroad that may be built southward from Kansas or Missouri to said river; and,

WHEREAS, The ability of said company to build said main trunk and branch roads would be greatly increased by the consent of the State to exchange the six per cent. bonds of the said companies, now held by the State, for the seven per cent. gold interest-bearing bonds of the said Houston and Texas Central Railway Company, issued by virtue of a deed of trust executed by said company on the first day of July, A. D. 1866, in which deed of trust Shepherd Knapp and David S. Dodge, of the City of New York, are named (and have accepted) as trustees; and,

WHEREAS, It is believed that such exchange can be made without in any manner endangering the security of the school fund; therefore:

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Washington County Railroad is hereby made and declared to be, to all intents and purposes in law, a part of the Houston and Texas Central Railway, and shall be under the control and management of the Houston and Texas Central Railway Company in like manner as every other part of the said railway; and the Houston and Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the "Washington County Railroad" from the Town of Brenham, in the County of Washington, to the City of Austin, in the County of Travis, by the most eligible route to be selected by the engineers of the company; and the said company shall also have the right to build a branch road diverging from the main trunk at some point in Navarro County and striking Red River at such point as will enable said railway company to make a connection with any railroad which may be built to said river from the northward; and

the said Houston and Texas Central Railway Company, by reason of the construction of said railway from the Town of Brenham to the City of Austin, and by reason of the construction of said branch from Navarro County to Red River, shall have and enjoy all the rights, privileges, grants and benefits that are now, or may at any time hereafter be, secured to any railroad company in the State of Texas, by any general law of the State, and shall be subject, in respect of said railway and said branch, to all the duties and responsibilities imposed upon said Houston and Texas Central Railway Company by its charter and by other laws of the State.

SEC. 2. For the whole amount of principal and interest due to the State by the Houston and Texas Central Railway Company and the Washington County Railroad Company on the first day of July, A. D. 1870, the Governor of the State shall accept and receive from the Houston and Texas Central Railway Company the seven per cent. land-grant sinking-fund first-mortgage gold interest-bearing bonds of said company, which said bonds, also payable in gold, are issued, or to be issued, by virtue of a deed of trust executed by the said company on

the first day of July, A. D. 1866, and mature on the first of July, A. D. 1891, the interest on which is payable on the first days of January and July of each year, in which deed of trust Shepherd Knapp and David S. Dodge, of New York, were named and accepted as trustees; and the Governor shall, after making the exchange of bonds herein provided for, cancel and deliver to said railway company the six per cent. bonds of the Houston and Texas Central Railway Company and of the Washington County Railroad Company, now held by the State for sums borrowed from the school fund; and the settlement and exchange of bonds herein provided for shall be made at any time that may be agreed upon by the Governor and the said railway company between the passage of this act and the first day, of December, A. D. 1870; and in making the settlement herein provided for, the Houston and Texas Central Railway Company shall be allowed a credit for the sums paid in the treasury warrants of the State during the years 1864 and 1865 by the said company and by the Washington County Railroad Company, upon the accounts on which said sums were respectively paid by said companies, the said sums

amounting in the aggregate to one hundred and fifty-two thousand eight hundred and sixty-four dollars and fifty cents; provided, that the said Houston and Texas Central Railway Company shall never issue an amount of the seven per cent. bonds above described to exceed twenty thouand dollars to the mile of completed road, including such bonds as have been already issued; nor shall said company ever issue any other bond that shall rank as a first mortgage bond on its road, without first paying the whole amount of the indebtedness of the company to the State.

SEC. 3. The said Houston and Texas Central Railway Company is hereby authorized—any former laws to the contrary notwithstanding—to build its road through the Counties of Limestone and Navarro, on the most eligible route to be designated by its engineers; provided, that the main trunk of said railway shall pass through the County of Dallas, and to a point on Red River within fifteen miles of Preston, as is now required by law, and shall be built as fast as the branch.

SEC. 4. No forfeiture of any of the rights or privileges secured to it by existing laws shall be

enforced against the Houston and Texas Central Railway Company by reason of its failure to comply with the conditions as to construction imposed by the first section of the Act of the twenty-first of September, A. D. 1866, entitled "An Act granting lands to the Houston and "Texas Central Railway Company;" but the said company shall have and enjoy all the rights and privileges secured to it by existing laws, the same as if the conditions embraced in the first section of the said act of the twenty-first of September, A. D. 1866, had been in all respects complied with; provided, that the land-grant to said company shall cease unless the said company shall complete their main trunk east of the Brazos River to Richland Creek, in Navarro County, within twelve months from the first day of October, A. D. 1870, and shall also complete their road to the City of Austin within two years after the passage of this act.

SEC. 5. The branch road from Navarro County to Red River, provided for in the first section of this act, shall be, to all intents and purposes in law, a part of the Houston and Texas Central Railway, and shall be under the control and management of the said Houston and Texas

Central Railway Company in like manner as every other part of the said railway.

SEC. 6. All laws and parts of laws now in force concerning the Houston and Texas Central Railway Company, or the Washington County Railroad Company, not in conflict with the foregoing provisions, shall not be affected by the passage of this act; and the State shall have the right to interfere, by such legislation as may be thought necessary, to prevent neglect on the part of the said Houston and Texas Central Railway, so that the same may always remain an adequate security to the State for the amount that may be due by the company.

SEC. 7. This act shall take effect from and after its passage.

The above act is published as Chapter CXLVIII., Special Laws, passed at the extra session of the Twelfth Legislature of Texas, pages 325–328, and the doubt sought to be cast upon its enactment by the Secretary of State in publishing the laws of that session was removed by the Supreme Court of Texas in *Houston and Texas Central Ry. Co. vs. Odum, 53 Tex., 343.*

Joint Resolution Proposing an Amendment to Section 6 of Article 10 of the Constitution of the State of Texas.

Be it resolved by the Legislature of the State of Texas that Section 6 of Article 10 of the Constitution of the State of Texas be so amended as hereafter to read and be as follows:

"SECTION 6. The Legislature shall not "hereafter grant lands, except for purposes "of internal improvement, to any person or "persons, nor shall any certificate for land "be sold at the Land Office except to actual "settlers upon the same, and in lots not "exceeding one hundred and sixty acres; "*provided*, that the Legislature shall not "grant out of the public domain more than "twenty sections of land for each mile of "completed work in aid of the construction "of which land may be granted; *and provided, further*, that nothing in the foregoing proviso shall affect any rights "granted or secured by laws passed prior "to the final adoption of this amendment."

Passed May 17, 1871.

(The above resolution is published as Chapter XXVI., page 160, of the joint resolution passed at the first session of the Twelfth Legislature of Texas.)

Joint Resolution Ratifying an Amendment to Section Six of Article Ten of the Constitution of the State of Texas, Proposed by Joint Resolution of the Legislature of the State of Texas, Passed May 17, 1871.

WHEREAS, The Legislature of the State of Texas, on the 17th day of May, 1871, passed by a two-thirds vote a joint resolution proposing an amendment to Section Six of Article Ten of the Constitution of the State of Texas; and,

WHEREAS, Said proposed amendment was submitted to the consideration and vote of the people at the last general election held in this State on the 5th, 6th, 7th and 8th days of November, A. D. 1872; and,

WHEREAS, It appears that a majority of those voting upon said proposed amendment voted in favor of said amendment; therefore,

Be it resolved, by the Legislature of the State of Texas, that the said amendment to Section Six of Article Ten of the Constitution of the State of Texas, which is as follows: "SEC. 6. The "Legislature of the State of Texas shall not here

" after grant lands except for purposes of internal " improvement to any person or persons, nor shall " any certificate for land be sold at the Land Office " except to actual settlers upon the same, and in " lots not exceeding one hundred and sixty acres ; " *provided*, that the Legislature shall not grant out " of the public domain more than twenty sections " of land for each mile of completed work, in aid of " the construction of which land may be granted; " *and*, *provided further*, that nothing in the fore- " going proviso shall affect any rights granted or " secured by laws passed prior to the final adoption " of this amendment;" be, and the same is hereby, ratified as an amendment to the Constitution of the State of Texas.

SEC. 2. That this resolution take effect and be in force from and after its passage.

Passed March 19, 1873.

(The above is published as Joint Resolution No. 7, pages 224, 225, General Laws, passed by Thirteenth Legislature of Texas.)

Section 6, Article X., of the Constitution, adopted in 1869–70, reads as follows :

"SECTION 6. The Legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the Land

Office, except to actual settlers upon the same, in lots not exceeding one hundred and sixty acres."

An Act to Encourage the Construction of Railroads in Texas by Donations of Land.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that any railroad company heretofore chartered, or which may be hereafter organized under the general laws of this State, shall, upon the completion of a section of ten miles or more of its road, be entitled to receive, and there is hereby granted to every such railroad, from the State, sixteen sections of land for every mile of its road so completed and put in good running order; *provided*, that no company whose road is of less than three feet gauge shall be entitled to receive any grant of lands under this section; *provided, however*, that companies constructing railroads on the prismoidal plan shall be entitled to eight sections of land to the mile on the same terms as other roads; *provided, further*, that this act shall not be construed to renew or continue any right to companies who

have failed or may fail to comply with the terms of their charters, with reference to the completion of portions of their roads in stated times; *provided, further*, that the provisions of this act shall not be so construed as to grant the aid herein provided for to any railroad that has already received or is otherwise entitled to receive aid from the State to the amount of sixteen sections of land to the mile.

SEC. 2. Any railroad company having completed and put in good running order a section of ten miles or more of its road may give notice of the same to the Governor, whose duty it shall be to appoint some skillful engineer, if there be no State Engineer, to examine said section of road, and if, upon the report of said engineer under oath, it shall appear that said road is substantially built and fully equipped for the transportation of both passengers and freight, and that the same is operated by steam, and is constructed of iron rails of not less than thirty pounds to the lineal yard (*provided*, that rails for prismoidal roads shall not weigh less than twenty-two pounds to the lineal yard), and has been constructed in accordance with the provisions of its charter, or of the general laws

under which it may be constructed, and of the general laws in force regulating railroads, thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company certificates of six hundred and forty acres of land each, equal to sixteen sections to the mile of road so completed; whereupon said company may apply to the district surveyor of any land district in this State to survey such lands out of any of the unappropriated public land in his district. Said surveys shall be made in alternate sections, or half sections, as nearly square as practicable, one section for the company and one for the State, for the benefit of the public school fund. A map of all such surveys shall be returned with the field notes to the General Land Office, when the Commissioner of the General Land Office shall number contiguous surveys with even and odd numbers, and shall issue to the company patents for the odd sections of said surveys.

SEC. 3. All lands acquired by railroad companies under this act shall be alienated by said companies—one-half in six years and one-half in twelve years from the issuance of patents to the same; and all lands so acquired by railroad

companies, and not alienated as herein required, shall be forfeited to the State and become a part of the public domain, liable to location and survey as other unappropriated lands; *provided, further*, that the State shall retain the right to regulate the rates of freight and passengers' fare by general law on all roads accepting a grant of land under this act.

SEC. 4. That, there being no law authorizing State aid in construction of railroads now in force, an imperative public necessity and an emergency exist for the immediate passage of this act, and it is hereby declared that this act take effect and be in force from and after its passage.

Approved August 16, 1876.

Takes effect ninety days after adjournment.

(The above act is published as Chapter CI., pages 153, 154, General Laws, passed by the Fifteenth Legislature of Texas.)